Posted Workers and Free Movement of Services in the European Union – the Impact on National Employment and Immigration Law

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Tiivistelmä – Referat – Abstract

This thesis examines posting of workers within the free movement of services in the European Union. The emphasis is on the case law of the European Court of Justice and in the role it has played in the liberalisation of the service sector in respect of posting of workers. The case law is examined from two different viewpoints: firstly, that of employment law and secondly, immigration law. The aim is to find out how active a role the Court has taken with regard these two fields of law and what are the implications of the Court's judgments for the regulation on a national level.

The first part of the thesis provides a general review of the Community law principles governing the freedom to provide services in the EU. The second part presents the Posted Workers' Directive and the case law of the European Court of Justice before and after the enactment of the Directive from the viewpoint of employment law. Special attention is paid to a recent judgment in which the Court has taken a restrictive position with regard to a trade union's right to take collective action against a service provider established in another Member State. The third part of the thesis concentrates, firstly, on the legal status of non-EU nationals lawfully resident in the EU. Secondly, it looks into the question of how the Court's case law has affected the possibilities to use non-EU nationals as posted workers within the freedom to provide services. The final chapter includes a critical analysis of the Court's case law on posted workers.

The judgments of the European Court of Justice are the principal source of law for this thesis. In the primary legislation the focus is on Articles 49 EC and 50 EC that lay down the rules concerning the free movement of services. Within the secondary legislation, the present work principally concentrates on the Posted Workers' Directive. It also examines proposals of the European Commission and directives that have been adopted in the field of immigration. The conclusions of the case study are twofold: while in the field of employment law, the European Court of Justice has based its judgments on a very literal interpretation of the Posted Workers' Directive, in the field of immigration its conclusions have been much more innovative. In both fields of regulation the Court's judgments have far-reaching implications for the rules concerning posting of workers leaving very little discretion for the Member States' authorities.

Avainsanat – Nyckelord – Keywords

Free movement of services, posted worker, labour law, immigration policy

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IV ABBREVIATIONS

ECJ	= European Court of Justice
ECR	= European Court Reports
EC	= European Community or the Treaty establishing the European Community
EEA	= European Economic Area
EEC	= European Economic Community or Treaty establishing the European Economic Community
EESC	= European Economic and Social Committee
EU	= European Union or the Treaty on European Union
Ibid.	= Ibidem (“at the same place”)
OJ	= Official Journal
OMC	= Open Method of Coordination
Para.	= Paragraph
PWD	= Posted workers’ directive
TCN	= Third-country national

1 Introduction

The free movement of services is a fundamental part of the European Union's internal market. Provision of services forms the basis for an increasing number of transactions not only on a European, but also on a global scale. However, for the time being the great majority of services never cross a border, not even a language border. Compared to another of the EU's fundamental freedom of movement, goods, the internal market in services is still very much struggling to reach its full potential. This makes one wonder what makes services special, what distinguishes them from goods. Besides the fact that services are clearly something more abstract than goods, an integral part of most types of services are the people who provide them. When services move, so do people. Since one person cannot do everything, providers of services have started to send their employees to do the work for them. The sending of employees, which is more generally called posting of workers, is what this thesis concentrates on.

Posting of workers from one EU Member State to another is examined from two different viewpoints: firstly, that of employment law and secondly, immigration law. I have chosen these specific branches of law as they concern matters that for a long time were in the exclusive competence of the Member States. Accordingly, there has been a large amount of clashes between national interests and the free movement of services especially in these fields of law. Although nowadays the Member States' competence in social and immigration matters has been shared with the Community, the clashes have not disappeared. Thus, the European Court of Justice is the organ that has for several times during the past 25 years had the invidious task to balance the market freedom of service providers with these sensitive matters that are inherently linked with posting of workers.

The specific task of this thesis is to demonstrate the role that the European Court of Justice has played in the liberalisation of the service sector for those undertakings that wish to provide their services in other Member States by using their own manpower. Throughout the European integration, the Court has every so often been accused of excessive judicial activism. With regard to posting of workers that claim has occasionally been put forward quite vigorously. My aim is to find out whether the case law of the European Court of Justice on posted workers gives reason for such accusations. Unquestionably, it is a

demanding task to undertake especially considering that the answer inevitably depends on the personal views and values of the observer. The inspiration for this work, however, was based on a conception that the public opinion of the Court's case law on posting of workers has been somewhat misled. It seemed to me that the greatest criticism often arose from the greatest misinterpretation. Therefore I decided to clarify whether the Court has really created new law in its rulings on posted workers, as so many claim it has. Moreover, my aim is to find out what are the case law's implications for national regulation in the selected fields of employment and immigration law.

I will be examining two different lines in the Court's case law on posted workers. The rulings concerning social issues have undoubtedly been the focus of most attention. In the recent *Laval*[1] case the Court ended up precluding a trade union's collective action that was taken against a cross-border service provider that was paying its workers under the local minimum rates of pay. If one did not know the context of the case, it would be easy to conclude that the Court has entirely disregarded the social protection of workers and the fundamental right to take collective action. The same goes for another recent ruling in the *Rüffert*[2] case, in which the Court rejected a compulsory public contracts clause that obliged foreign undertakings to pay its workers local minimum wages. Although many different conclusions were possible in both of these cases, I will argue that the Court did not make new law but instead based its judgments on the most important instrument it was provided with – the Posted Workers' Directive[3].

When it comes to the line of case law on immigration matters, more exactly the employment of non-EU nationals, the situation is equally interesting. I will argue that it is actually in the field of immigration law where the Court has taken its most innovative steps. By giving service providers the right to move freely with all their staff has had a major impact on the possibility to use non-EU nationals as posted workers. Quite effortlessly the Court has abolished posted workers' work permits altogether. The Community legislator, however, has not succeeded in doing the same in spite of several attempts. In its case law on posted workers the Court has stepped towards a convergence of

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[1] Case C-341/05, *Laval* [2007] ECR I-11767.
[2] Case C-346/06, *Rüffert* [2008], the judgment of 3 April 2008, not yet published in the ECR.
[3] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996, OJ L 18, 21.1.1997, p. 1–6.

the legal status of EU nationals and non-nationals. With this the Court may have given the necessary incentive, which will finally lead to the extension of free movement rights also to those who are not EU citizens but in any case lawful residents in the EU.

A lot of literature has been published on posted workers when it comes to matters concerning employment law. That literature will definitely not decrease after the recent rulings in *Laval* and *Rüffert*. In contrast, strikingly little has been written about posted workers who are not EU-nationals. It seems extremely difficult to find literature in which all the recent developments in the case law would have been taken into account. This is the gap that this thesis is seeking to fill. Moreover, it aims at forming a comprehensive picture of the case law on posted workers by comparing the conclusions the Court has reached in the field of employment law, on the one hand, and in the immigration law, on the other. This comparison is one way to estimate how active a role the Court has taken in its case law on posted workers in general.

First and foremost, this thesis is a case study of the judgments of the European Court of Justice in the field of posting of workers. In order to provide the necessary legal framework for understanding these judgments, I shall start by examining the principles behind the freedom to provide services within the EU. From there I shall proceed to the presentation of the Posted Workers' Directive that is the most significant piece of secondary legislation that exists on posting of workers within the cross-border provision of services. In the following chapter I shall examine the Court's case law concerning the rules of national employment law applicable to posted workers. When moving on to the part of the thesis concerning non-EU nationals, I shall start by presenting the overall progress the Community legislator has made in the field of immigration. It is only on that basis that the significance of the case law on posted non-EU nationals becomes conceivable. Finally, I shall look into the question of whether the Court is to blame for excessive judicial activism when it comes to its judgments on posting of workers.

2 The Controversial Development of the Free Movement of Services

2.1 Aiming at a Single Market of Services

The creation of a common market lies at the heart of the European Community's ('EC') aims. Article 3 (1) (c) of the EC Treaty[4] declares that the activities of the Community shall include an internal market characterised by the abolition of obstacles to the free movement of goods, persons, services and capital. This aim has on several occasions been confirmed by the European Court of Justice (the 'ECJ'), which has stated that the EC Treaty seeks to unite national markets into a single market having the characteristics of a domestic market[5]. The process of integration involves a gradual increase in the central power within the supranational institutions at the expense of national governments. Although the goal is clear, it has proved challenging to attain especially when dealing with sensitive and politically charged issues.

This thesis will concentrate on the free movement of services that is laid down in a detailed manner in Articles 49–55 EC. I start by examining the development of this controversial freedom that has for a long time been under the shadow of the more progressive rules concerning goods, persons and capital. For the purpose of my topic, I shall focus on the type of services that include movement of workforce[6]. Apart from its relevance to this thesis, the movement of workforce in the provision of services has proved very troublesome for Member States to agree upon. It is understandable keeping in mind the special nature of services in contrast to the relatively developed free movement of goods. Whereas with regard to goods they are the only things that move, the provision of services very often includes some kind of movement of people[7]. Their working conditions and the

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[4] Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, OJ C 321E, 29.12.2006, p. 1–186.
[5] See cases 270/80, *Polydor* [1982] ECR 329, para. 16 and 15/81, *Gaston Schul* [1982] ECR 1409, para. 33.
[6] It needs to be noted that in the modern world there are, however, many types of services that are of a very abstract nature and do not involve any movement of workforce, e.g. Internet and telephone selling, insurance and banking services. It is also worth noting that when workers move independently of their employer from one Member State to another Article 39 EC governs their situation instead of Article 49 EC. This is the situation in cases where a person moves to work for an employer established in another Member State or goes to search employment in a Member State other than his state of origin. Within the scope of Article 49 EC, on the other hand, an employee carries out his work in a Member State other than the state where he normally works for a limited period of time while staying in an employed relationship in the state of origin.
[7] In the case of services, there may actually be several moving factors: in addition to the provider himself, it is often his staff, his equipment and material that cross national borders. See COM (2002) 441 final, p. 6.

quality of work is much harder to control than the quality and safety of goods. Moreover, the nature of employment law is a very traditional field of national regulation. The same concerns immigration law that has been, and mostly still is, at the very heart of national sovereignty. The following chapters will demonstrate the role that the ECJ has played in the liberation of the service sector for those undertakings that wish to provide their services in other Member States by using their own manpower.

Throughout the European integration, Member States have been reluctant to liberate the cross-border provision of services due to the far-reaching impacts a free service market might have on their national economies. The European Commission has on many occasions pointed out that its internal market strategy has been prompted by the poor level of development of cross-border services in the EU[8]. The service sector accounts for more than 50 % of the EU's gross domestic product and provides over 70 % of overall employment. Nonetheless, it represents only 20 % of the volume of trade carried out within the Union[9]. The cross-border service sector's growth potential is thus an important stimulus to the creation of new jobs in Europe[10]. Furthermore, free trade in services allows for greater specialisation, which leads to comparative advantage[11]. This allows Member States to ensure the efficient use of Europe-wide resources and maximises consumer welfare. However, there are also many other factors involved. This thesis will show that Member States have successfully argued for the justification of several restrictions on the free movement of services. With respect to the exploitation of foreign workforce, there is a significant line of case law on restrictions founded on the protection of workers and prevention of social dumping.

2.2 The Scope of the Free Movement of Services

2.2.1 The Meaning of Services in Community Law

Article 12 of the EC Treaty lays down the principle of non-discrimination on grounds of nationality. The prohibition of discrimination on the basis of nationality is also

[8] See, e.g., COM (2002) 441 final, p. 9 and COM (2000) 888 final, p. 7.
[9] Opinion of the European Economic and Social Committee on 'The internal market in services – requirements as regards the labour market and consumer protection', OJ C 175, 27 July 2007, p. 15.
[10] COM (2002) 441 final, p. 56.
[11] Barnard 2007, p. 3.

encompassed as a general principle in the Treaty provisions on the fundamental freedoms of movement. Those freedoms should be considered as *leges speciales* to the general prohibition contained in Article 12 EC. Article 49 EC is the *lex specialis* in the field of services. [12] It lays down the principle of freedom to provide services on a temporary basis by a person established in one Member State to a recipient established in another. Services are defined in Article 50 EC, which also establishes the principle of equal treatment with respect to foreign service providers that are nationals of another Member State. According to Article 50 EC, 'services' shall in particular include activities of an industrial and commercial character, and activities of the professions and craftsmen. Services shall be considered to be 'services' within the meaning of the EC Treaty where they are normally provided for remuneration. Services of public utility such as public education are therefore excluded from the scope of the definition[13]. Article 50 EC also suggests that the service provisions are subordinate to the other freedoms; it states that services shall be considered to be 'services' within the meaning of the Treaty insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons[14]. Traditionally more cases have thus been decided under the articles governing the other types of fundamental freedoms, but since the 1990s the Court has constantly expanded its case law on Articles 49 and 50 EC[15].

In Community law the provision of services encompasses three basic cross-border situations. Firstly and most traditionally, a person or an undertaking may go to another Member State to provide services. For example, an Austrian mechanic occasionally fixes his clients' cars in Germany. Another basic situation is at hand when a EU citizen goes to another Member State to take advantage of a service of some kind. Although Articles 49 and 50 EC are directed towards service providers, there is necessarily a similar freedom available for the recipients of services. The freedom to provide services would not be

[12] Roth 2002, p. 15.
[13] Huttunen 2007, p. 137.
[14] See case 452/04, *Fidium Finanz* [2006] ECR I-09521, para. 32, in which the Court however held that Article 50 EC merely relates to the definition of the notion of services and does not establish any order of priority between the freedom to provide services and the other fundamental freedoms.
[15] *Hatzopoulos* and *Do* have noted that between 2000-2005 (over 140 cases) the Court has dealt with almost 3,5 times as many cases on services as during the period of 1995-1999 (40 cases). According to them, the Court's 'third generation' case law on services is both from a quantitative and qualitative perspective outweighing the importance of the case law on goods. Hatzopoulos and Do 2006, p. 923–924.

complete if nationals of Member States could not travel themselves to receive services[16]. A typical example of a situation where the recipient of services moves is a tourist on a vacation in another Member State. The third situation covered by Article 49 EC is at hand when both the provider and recipient of a service stay at home but the service itself crosses a border. This form of provision of services is becoming increasingly important considering the growth of Internet commerce, mail order selling and commercial cable channel business.[17] All these basic situations covered by Article 49 EC have an interstate element, as it is the provider, the recipient or the service itself that is crossing a border. However, in recent years the Court has extended its case law to cover situations that could have been considered 'wholly internal' and thus outside the application of Community law. Although purely hypothetical situations are not covered, even the existence of potential provision of services to virtual recipients is enough to trigger the applicability of Community law[18]. If there is an intention and material possibility to provide services to recipients in other Member States, Article 49 EC may be invoked. The Court's ruling in *Omega*[19] further demonstrated that not only virtual but also future services fall into the ambit of Article 49 EC.[20]

In respect of the scope of services, the freedom to provide services has to be differentiated from the freedom of establishment founded on Article 43 EC. The said article concerns self-employed persons and companies pursuing their activities in a Member State on a permanent basis[21]. In some cases there is only a fine line between services and establishment especially in situations where it is necessary for the service provider to

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[16] See joined cases 286/82 and 26/83, *Luisi and Carbone* [1984] ECR 377 on restrictions on the right of free movement in order to receive medical treatment in another Member State.
[17] Jääskinen 2007, p. 126–127.
[18] Case C-60/00, *Carpenter* [2002] ECR I-6279. The case concerned Mrs *Carpenter* who was the Filipino wife of a British service provider. The Court held that the expulsion of Mrs *Carpenter* would be detrimental to the couple's family life and thus to the conditions under which Mr *Carpenter* exercised his fundamental freedom to provide services.
[19] Case C-36/02, *Omega* [2004] ECR I-9609. In *Omega* Article 49 EC was triggered when the German prohibition of 'play to kill' games frustrated a German company's leasing contracts for machinery concluded with a British company thus limiting the German company's freedom to receive services. At the time of the prohibition the two companies had not yet concluded any contract, but the Court held that the prohibition was capable of restricting the future development of contractual relations between the parties.
[20] Hatzopoulos and Do 2006, p. 925–926, 988.
[21] The term 'self-employed' was defined by the Court in *Jany* where it explained that, unlike workers, the self-employed carry their activity outside any relationship of subordination and they work under their own responsibility in return for remuneration paid in direct and in full. See case C-268/99, *Jany* [2001] ECR I-8615, para. 70–71.

spend a substantial period of time in the Member State where the service is provided[22]. In *Factortame II*, the Court stated that the concept of establishment involves "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period"[23]. For the provisions of establishment to apply, the Court has thus held that it is generally necessary to have secured a permanent presence in the host Member State.[24] The main difference between the freedom of establishment and the freedom to provide services is therefore in the permanence of the activity. The freedom of establishment concerns undertakings that wish to relocate or set a branch in another Member State, whereas in the provision of services the undertaking remains established in its home state and offers services in other states only on a provisional basis. However, it is not only the duration of the provision of the service that matters. In *Gebhard* the Court remarked that the temporary nature of the activities in question has to be determined also in the light of its regularity, periodicity or continuity[25]. According to the Court, the service provider may equip himself in the host state with the infrastructure necessary for the purposes of performing the services in question. In contrast, the Court's interpretation of the freedom of establishment necessarily involves a more stable and far-reaching attachment to the local economy. This is illustrated by *Gebhard*, in which the Court said that the concept of establishment allows 'a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons'[26].

Notwithstanding the close connections between the different types of free movement, the chosen category might have a crucial effect on the possible restrictions of the activity in question. As Advocate General *Jacobs* has noted, it is reasonable to expect that a person established in a Member State should, as a general rule, be required to comply with the law of that state in all respects. In contrast, it is harder to accept that a person established in one

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[22] Case C-76/90, *Säger* [1991] ECR I-4221, opinion of Advocate General Jacobs, delivered on 21 February 1991, para. 25.
[23] Case C-221/89, *Factortame II* [1991] ECR I-3905, para. 20.
[24] Barnard 2007, p. 308-310.
[25] Case C-55/94, *Gebhard* [1995] ECR I-4165, para. 27.
[26] Ibid. para. 25. The economic approach was taken further in case C-215/01, *Schnitzer* [2003] ECR I-14847, para. 31, in which the Court abandoned the temporal criterion in favour of a more economic one by holding that the Treaty does not afford a means of abstractly determining the duration beyond which the supply of a service should be regarded subject to establishment. The determining criterion should thus be foremost the nature of the activity and not its duration or frequency. See Hatzopoulos and Do 2006, p. 927.

Member State should be required to comply with all detailed regulations in force in each of the states where the provision of services takes place. If such practice were accepted, it would render the notion of a single market unattainable in the field of services.[27] One can also argue that the differentiation between the establishment and provision of services is no longer of such a great importance as the general prohibition of restrictions, also of non-discriminatory ones, applies to Articles 43 and 49 EC alike[28]. The Court has started to apply the 'prohibition of restriction' approach also with regard to conditions on establishment, although it has generally held that a national of a Member State intending to establish himself in another must in principle comply with all the conditions the activity is subject to in that state[29]. Although there are common characteristics of the two freedoms, there however remains a significant difference with regard to the kind of conditions undertakings may be required to apply in the host state: in the provision of services their scope and number remains lower than in the field of establishment. Accordingly, certain rigorously regulated activities subject to special conditions may remain limited to those undertakings that have their place of establishment in the country in question[30].

2.2.2 Direct Effect of the Freedom to Provide Services

Since its historic ruling in *Van Gend en Loos*[31], the Court has upheld that subject to certain conditions Treaty articles are capable of having a direct effect, which means their capacity to confer rights on individuals. The Court's later judgments have defined that provisions of binding Community law which are clear, precise and unconditional enough can be invoked by individuals before national courts and used to challenge inconsistent action of state authorities.[32] With regard to the Treaty provisions on services, the Court held for the first time in *Van Binsbergen*[33] that Articles 49 and 50 EC [then Articles 59 and 60 EEC] impose a well-defined obligation that may be relied on by individuals before national courts. The

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[27] Case C-76/90, *Säger* [1991] ECR I-4221, opinion of Advocate General Jacobs, delivered on 21 February 1991, para. 23.
[28] See Giesen 2003, p. 155 and Lau Hansen 2002, p. 197.
[29] See case C-19/92, *Kraus* [1993] ECR I-1663, para. 27, 32 and case C-55/94, *Gebhard* [1995] ECR I-4165, para. 36–37.
[30] Typical cases are such where the requirement of establishment relates to the need to ensure compliance with professional rules of conduct and guarantee the protection of the recipients of services. The requirement of establishment has to be objectively necessary in order to attain those objectives and it must not exceed what is necessary to attain them. See, e.g., case 33-74, *van Binsbergen* [1974] ECR 1299, para. 15–17.
[31] Case 26/62, *van Gend en Loos* [1963] ECR English Special Edition 1, section IIB of the judgment.
[32] Craig and de Búrca 2008, p. 269–271.
[33] Case 33-74, V*an Binsbergen* [1974] ECR 1299, para. 26–27.

Court noted that this was the case at least in so far as those articles seek to abolish any discrimination by reason of nationality or residence. Therefore, even in the absence of any further implementing legislation, a service provider may base his or her rights directly on Articles 49(1) EC and 50(3) EC[34].

The wording of the Treaty is far from clear when it comes to the question of whether its provisions cover restrictions to the free movement of services caused by private parties[35]. Whereas Articles 50(3), 53 and 54 EC impose obligations solely on Member States, Article 49 EC remains silent about the author of prohibited measures.[36] Notwithstanding the literal vagueness of the Treaty, the Court has on several occasions held that certain persons governed by private law may be bound by Article 49 EC if they are able to create obstacles to the free movement of services when acting within the framework of their legal autonomy. According to the Court the abolition of obstacles to the free movement of services would be compromised if those obstacles resulting from private measures could neutralise the abolition of barriers of national origin. The prohibition of discrimination does not only apply to the action of public authorities but extends likewise to rules of a private nature aimed at regulating in a collective manner gainful employment and the provision of services.[37] So far the Court has only condemned such collective rules of a private nature that have a 'quasi-statal effect' in the regulation of gainful employment and services. One can however argue that any restrictive action of a private nature could be condemned, whether it is in the form of collective regulatory rules or not. That would be a natural consequence considering the overall system of free movement law that emphasis the effect a measure has and not its form.[38]

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[34] Huttunen 2007, p. 133. After the *van Binsbergen* case the Court has expanded the direct effect of Article 49 EC also to non-discriminatory measures that are liable to restrict the provision of services. See especially case C-76/90, *Säger* [1991] ECR I-4221 below in section 2.3.

[35] This is referred to as the horizontal direct effect as opposed to the vertical direct effect between individuals and state authorities.

[36] Snell 2002, p. 139.

[37] Case 36-74, *Walrave* [1974] ECR 1405, para. 4–5, 17–18. See also cases 13-76, *Donà* [1976] ECR I-1333, para. 17, 19 and joined cases C-51/96 and C-191/97, *Deliège* [2000] ECR I-2549, para. 47. With regard to the direct horizontal effect of Article 39 EC see case C-415/93, *Bosman* [1995] ECR I-4921, para. 83.

[38] Snell 2002, p. 143. See also Advocate General *Maduro*'s opinion of 23 May 2007 in case C-438/05, *Viking* [2007] ECR I-10779, para. 43, in which he holds that " -- the rules on freedom of movement apply directly to any private action that is capable of effectively restricting others from exercising their right to freedom of movement".

2.3 Restrictions and Exceptions to the Free Movement of Services

Despite the progress made during the past decades, the attainment of a genuine internal market within the EU is still undermined due to various barriers to trade. Although many of them are the result of protectionist national measures, a significant number exists simply because Member States do things differently. This is especially evident in the field of persons and services where people's activities are regulated in each Member State depending on their cultural, political and social particularities. In this respect, the Commission separates two broad categories of restrictions: those deriving directly or indirectly from legal constraints and those deriving from non-legal factors[39]. Legal barriers stem from divergent national regulations and practices, behaviour of national authorities and from legal uncertainty caused by the complexity of cross-border situations. They cover all obstacles that are liable to render the cross-border provision of services less advantageous than in a national market[40]. Significant non-legal barriers are for example the lack of information about applicable national rules and their interpretation and the low level of awareness of the rights the Internal Market accords citizens and businesses alike[41].

Before the 1990s the Court's case law seemed to indicate that the interpretation of restrictions on the fundamental freedoms would have to follow different lines: Article 28 EC on the free movement of goods would prohibit any measures restricting the import of goods, whereas the provisions on workers, services and establishment were limited to the prohibition of discriminatory measures on grounds of nationality. However, the development in the last two decades has moved towards a convergence of the freedoms and replaced the discriminatory test by a general prohibition of restrictions also in matters other than goods. At the same time the Court has taken a more lenient approach with regard to restrictions on the free movement of goods by approving indistinctly applicable measures when justified by objectives in general interest. One could argue that by being less active with regard to the free movement of goods, the Court is moving its resources to other, less integrated areas of common market, namely that of persons and services[42]. This

[39] COM (2002) 441 final, p. 14.
[40] Ibid.
[41] COM (2002) 441 final, p. 42–43.
[42] Maduro 1998, p. 99.

is conceivable considering the long-lasting better progress made in the field of goods with relation to the other fundamental freedoms of movement.[43]

The early judgments on the free movement of services were thus limited to the discriminatory approach[44]. From the beginning, unlawful discrimination covered not only nationality but also less overt discrimination on the grounds of residence[45]. In the 1980s the Court however moved step-by-step away from the strictly discriminatory position. It started limiting the application of national legislation in its entirety to temporary activities of cross-border service providers[46] and considering non-discriminatory measures such as authorisation requirements as restrictions under Article 49 EC[47]. The case *Säger*[48] was a culmination in this development.[49] In his opinion on *Säger*, Advocate General *Jacobs* had pointed out that there is a variety of restrictions in different Member States that are collectively capable of frustrating the aims of Article 49 EC and thus rendering impossible the attainment of a single market in services. This is the case even if a national measure does not in any way discriminate between domestic and foreign undertakings. In the Advocate General's opinion, an undertaking should only be required to comply with the legislation of the Member State where it is established, even if the provision of its services would not be lawful under the laws of the state where the service is provided. Those laws could only impose restrictions against the foreign undertaking if they were justified by some requirement that is compatible with the aims of the Community.[50]

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[43] Roth 2002, p. 1–2
[44] See case 33-74, *van Binsbergen* [1974] ECR 1299, para. 25 and case C-15/78, *Koestler* [1978] ECR 1971, para 5. In *Koestler* the Court held that even though the EC Treaty prohibits discrimination, it does no impose any obligation to treat a foreigner providing services more favourably than a person established in the state.
[45] Joined cases 62/81 and 63/81, *Seco and Desquenne* [1982] ECR 223, para. 8, in which the Court stated that the Treaty provisions prohibit also all forms of covert discrimination which, although apparently neutral, lead to the same result as overt discrimination based on nationality.
[46] Case 279/80, *Webb* [1981] ECR 3305, para. 16.
[47] Case C-205/84, *Commission v Germany* [1986] ECR 3755, para. 64, 68.
[48] Case C-76/90, *Säger* [1991] ECR I-4221.
[49] Roth 2002, p. 2–3.
[50] Case C-76/90, *Säger* [1991] ECR I-4221, opinion of Advocate General Jacobs, delivered on 21 February 1991, para. 23-27. The Advocate General, however, noted that the provision of services covers a vast spectrum of different activities. When a service provider spends a substantial period of time in another Member State the border-line between services and establishment may be a narrow one; in such a case it is possible that the Treaty merely requires the abolition of discrimination. The *Säger* case concerned a service that was provided by means of telecommunications.

The Court went along with the Advocate General's argumentation in *Säger* and gave the following statement that has been repeated several times in later judgments[51] on services:

> "-- Article 59 [now Article 49 EC] of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services"[52].

The *Säger* case concerned patent renewal services that in Germany were reserved exclusively to patent agents possessing a particular professional qualification, whereas in the United Kingdom, where the service provider was established, no such qualification was required. The Court held that the requirement of professional qualification was not justified by the nature of the service (renewal of patents upon their expiry), since the requirement was disproportionate to the objective pursued. By referring to the activity's lawfulness in the home state, the Court also acknowledged the possibility of 'mutual recognition' in the field of services: to require the service provider to comply with two sets of regulations would create a dual burden. At the same time the Court however acknowledged the possibility to allow some restrictions that are justified by considerations in the public interest, even though it was not possible in the case at hand. In *Säger* the Court thus adopted the same 'rule of reason' approach it had earlier developed with relation to goods in *Cassis de Dijon*[53].

Since these path-breaking rulings a significant role in the case law has been granted to judicially created exceptions of the freedoms of movement. The economic pressure faced in the 1970s had created new political imperatives for the Member States. In the following decades the social and environmental questions created need for further flexibility. The Court's creation of 'imperative requirements in the general interest' led the way out from a difficult situation, in which the narrowly formulated Treaty exceptions were no more capable of answering the rapidly changing societal values and attitudes. Already the early

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[51] Cases C-272/94, *Guiot* [1996] ECR I-1905, para. 10 and C-222/95, *Parodi* [1997] ECR I-3899, para. 18.
[52] Case C-76/90, *Säger* [1991] ECR I-4221, para. 12.
[53] Case 120/78, *Cassis de Dijon* [1979] ECR 649. Before the emergence of the 'rule of reason' it was only the express Treaty exceptions that could allow for restrictions on the fundamental freedoms of movement. In the field of services those exceptions are laid down in Article 46 EC that states that the Chapter's provisions shall not prejudice the applicability of provisions laid down by law, regulation or administrative action 'providing for special treatment for foreign nationals on grounds of public policy, public security or public health'.

Van Binsbergen[54] case, which was decided five years before the leading case in the field of goods[55], had showed the way to resolving the underlying conflict between rights of free movement and public interests by justifying a restriction on grounds not specifically mentioned in the Treaty. The possibility to invoke imperative requirements in the general interest in the field of services was brought to full parity with the Court's case law on goods in *Gouda*[56], *Commission v Netherlands*[57] and *Säger*[58] in 1991.[59]

In a case on the freedom of establishment, *Gebhard*[60], the Court clearly defined the four conditions under which a national measure liable to hinder or make less attractive the exercise of a fundamental freedom may take precedence over the fundamental freedoms of movement. First of all, the national measure must be applied in a non-discriminatory manner. Secondly, it has to be justified by imperative requirements in the general interest. Thirdly, it must be suitable for the attainment of the objective it is pursuing, and fourthly it must not go beyond what is necessary in order to attain that objective.[61] The judicially created exceptions are thus applied only to non-discriminative measures; only the express derogations of the Treaty can save discrimination[62]. Furthermore, the exceptions in the general interest are always subject to the principle of proportionality. By generally referring to the 'exercise of a fundamental freedom', the Court is implying that the same justificatory test applies to all types of fundamental freedoms guaranteed by the EC Treaty.

So far the Court has recognised an extensive amount of imperative requirements in the general interest[63]. Considering the subject matter of this work, the most important of them

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[54] Case 33-74, *van Binsbergen* [1974] ECR 1299, para. 12, 14. The case concerned the Dutch requirement that persons whose functions are to assist the administration of justice must be permanently established within the jurisdiction of Dutch courts. The ECJ held that Article 49 EC [then Article 59 EEC] caught discrimination on grounds of establishment but considered the requirement to be objectively justified by the need to ensure observance of professional rules of conduct.
[55] The seminal case 120/78, *Cassis de Dijon* [1979] ECR 649, para. 8, in which the Court referred to 'mandatory requirements'.
[56] Case C-288/89, *Gouda* [1991] ECR I-4007, para. 13.
[57] Case C-353/89, *Commission v Netherlands* [1991] ECR-4069, para. 17.
[58] Case C-76/90, *Säger* [1991] ECR I-4221, para. 15.
[59] Snell 2002, p. 181–185.
[60] Case C-55/94, *Gebhard* [1995] ECR I-4165.
[61] Ibid., para. 37.
[62] See case C-352/85, *Bond* [1988] ECR I-2085, para. 32. It is worth noting that the Court has not always been very consistent in its distinction between indirectly discriminatory and merely impeding measures.
[63] In respect of services, the Court included a list of such justifications as in 1991 in its judgment on *Gouda*. See case C-288/89, *Gouda* [1991] ECR I-4007, para. 14. The Court has not stopped adding new justifications, and the list is by no means an exhaustive one.

so far include protection of workers[64], prevention of social dumping[65] and unfair competition[66], prevention of abuse of free movement of services[67], the avoidance of disturbances on the labour market[68] and the combat against illegal employment[69]. The said objectives are not always far from protectionist measures based on national economic interests. It is however clear that an economic aim is not a legitimate aim and therefore a Member State may not rely on requirements in the general interest if the objective is to protect a particular economic sector of the state[70]. Although the Court over the years has more and more restricted the use of the express exceptions on the fundamental freedoms, justifications based on requirements in the general interest are constantly becoming broader[71]. By subjugating such requirements to the test of proportionality, the Court has managed to find the flexibility that is needed in order to reconcile the single market with the ever-existing national interests.[72]

2.4 The Lisbon Strategy and the Services Directive

In March 2000 the European Council held a special meeting in Lisbon where the Member States agreed to set out a new strategy that would "strengthen employment, economic reform and social cohesion as part of a knowledge-based economy" [73]. The European leaders aimed at making the EU the most competitive and dynamic knowledge-based economy in the world by 2010. They acknowledged that the globalisation and the challenges of a new knowledge-driven economy are affecting every aspect of people's lives and require a radical transformation of the European economy. It was further stated that the irrevocable changes were to be shaped consistently with the values and concepts of the European society while keeping in view the forthcoming enlargement with 12 new Member States. One of the decisions was to set out by the end of 2010 a strategy for the

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[64] Case 279/80, *Webb* [1981] ECR 3305, para. 17–19.
[65] Case C-244/04, *Commission v Germany II* [2006] ECR I-885, para. 61.
[66] Case C-60/03, *Wolff & Müller* [2004] ECR I-9553, para. 41.
[67] Case C-244/04, *Commission v Germany II* [2006] ECR I-885, para. 38.
[68] Case C-445/03, *Commission v Luxemburg* [2004] ECR I-10191, para. 38.
[69] Case C-255/04, *Commission v France* [2006] ECR I-5251, para. 46, 53.
[70] Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and others* [2001] ECR I-7831, para. 39 and case C-352/85, *Bond* [1988] ECR I-2085, para. 34.
[71] The Lisbon Treaty signed on 13 December 2007 (not in force) does not change the composition of the express Treaty exceptions. Further exceptions thus remain for the Court to determine.
[72] Barnard 2007, p. 494–498.
[73] European Council, Presidency Conclusions, 23 and 24 March 2000, Lisbon. Available at the Council's web page: <http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=432&lang=en&mode=g>. Cited on 12 October 2008.

removal of barriers to services. The European Council agreed that the establishment of a genuine internal market in services would create considerable potential for economic growth and essentially increase the employment rate throughout the Union. The service sector had therefore an important role to play in the Lisbon Presidency Conclusions.

Inspired by the new strategy, the Commission's original proposal[74] for a Directive on services in the internal market aimed at establishing a legal framework that would eliminate obstacles, firstly, to the freedom of establishment for services providers, and secondly, to the free movement of services within the EU. The proposal's most controversial issue was the 'country of origin' principle according to which in the coordinated fields service providers would only be subject to the national provisions of their Member State of origin[75]. Although the principle was accompanied with a number of derogations, it significantly narrowed down the possibilities to require service providers to apply the law of the host state. With regard to the labour law rules applicable in posting of workers, the proposal referred to the Posted Workers' Directive[76] and thus contained an exception from the country of origin principle[77]. However, it also wished to facilitate the cross-border posting by prohibiting certain administrative obligations considered excessive. These two aspects of the proposal, the country of origin principle and the rules on posted workers, caused particular consternation in the public opinion[78]. The fears were manifested by the polarised debate that concentrated on the infamous Polish plumbers. The opponents argued that the services Directive would lead to increased cost competition, i.e. so-called social dumping thereby seriously undermining the European social model. Even France's negative vote on the Constitutional Treaty in 2005 has been attributed to the critical attitude towards the Services Directive.[79]

Not surprisingly, the Commission had to draft a revised proposal[80] stressing the need to make the internal market for services fully operational, while preserving the European

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[74] COM (2004) 2 final/3 (the so-called "Bolkestein Proposal").
[75] Ibid., Article 16.
[76] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996, OJ L 18, 21.1.1997, p. 1–6.
[77] COM (2004) 2 final/3, Article 24.
[78] See, e.g., a statement of the Central Organisation of Finnish Trade Unions (SAK) on the proposal, 15.3.2004, points 6 and 7. Available at: <http://netti.sak.fi/sak/pdf/dirspalv.pdf> Cited on 5 October 2008.
[79] Barnard 2006, p. 290–291.
[80] COM (2006) 160 final (the so-called "McCreevy Draft" according to the new Commissioner responsible for internal market and services).

social model. The modified draft abandoned both the country or origin principle and all the specific provisions on the posting of workers. It also excluded all healthcare, taxation, temporary work agencies, security services and several social services from the scope of the Directive. The new proposal was simply based on the freedom to provide services concentrating on the removal of administrative barriers. In a speech[81] to the European Parliament Commissioner *McCreevy* said that the decision to remove all interaction between the services proposal and labour law was one of the most important elements in creating a more positive atmosphere around the new proposal. Although he did not agree with the opposition that the first draft was facing, he concluded that labour law issues had to be removed as they were poisoning the debate on the Directive that was desperately needed[82].

Although the liberalisation of the service sector has encountered grave resistance, the legal development in the past 20 years has helped to open the market in services. With the Services Directive the Community has moved from specific sector directives to a more general approach. However, many commentators are still critical towards the capacity of most types of services to move freely from one country to another. Due to language and cultural differences services are often of such a local nature that they hardly move across borders[83]. Besides, the EU is constantly facing new challenges, many of which relate to the union's eastern enlargement. While the terms and conditions of employment did not substantially differ between the 15 Member States, the situation has radically changed with

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[81] Commissioner Charlie McCreevy, Statement on the Revised Proposal for the Services Directive, Speech/06/220, European Parliament Plenary Session, 4 April 2006. Available at: <http://ec.europa.eu/commission_barroso/mccreevy/allspeeches_en.htm> Cited on 15 October 2008.

[82] The opposition was to a large extent based on an erroneous interpretation of the provisions on posted workers. Although the original articles relating to administrative cooperation and work permits of non-EU nationals were in conformity with the Court's case law, they had to be deleted under heavy objection. While the original version would have rationalised the need for preliminary rulings, the deletion of the provisions on posted workers actually led to further legal uncertainty. See Hatzopoulos and Do 2006, p. 977–978. *Liukkunen* on the other hand argues that the 'Bolkestein proposal' was against the true spirit of the Posted Workers' Directive and the Court's case law as it regarded the Directive merely as an exception to the country of origin principle. The well-established main principle of the extension of the host state's labour law to posted workers was thus relegated to the role of an exception. See Liukkunen 2006, p. 155. *Bruun* notes that the country of origin principle is inconsistent with existing Community legislation and that the limited derogation made to the Posted Workers' Directive is not sufficient to accommodate the exceptions based on many other Community instruments in the field of labour law. See Bruun 2006, p. 24.

[83] It seems to be more evident that the service sector has great potential especially in Internet commerce and in the outsourcing of various company activities. Also, it has already proved that big projects (e.g. in the construction sector) are capable of attracting service providers across the EU. The Commission however notes that many companies do not consider growth across national borders even if their services could easily be exported. A non-legal barrier against trade in services is thus also the companies' lack of "awareness of Europeanness". On the view of the Commission, see COM (2002) 441 final, p. 44–45.

the accession of 12 new states to the Union. As we have seen during the past years, the tensions between the free market and the preservation of national social models are growing[84]. A relevant question is whether the old Member States should be able to protect their markets from the threats of cheap labour or whether the Eastern workers should be granted the possibility to access a much wider market for their services. An important issue is also how the Union should react to those workers who are not nationals of any of the Member States. The following chapters will concentrate on these questions more closely.

3 Posting of Workers within the Provision of Services

3.1 The Concept of Posted Workers

Article 49 of the EC treaty gives undertakings established in a Member State the possibility to provide their services freely in other Member States. As a result of the EC Directives on public procurement, public bodies of each Member State have an obligation to treat all foreign service providers in an equal manner to domestic ones. Also private companies and households may resort to service providers established in other Member States. Consequently, companies established in the EU are relocating more and more of their employees in other Member States to fulfil various contracts. While traditionally it was only the 'key personnel' such as managers and professional specialists that were posted, these days posting covers both the top and bottom of the skills ladder[85]. A recent phenomenon is the increase in the cross-border posting of workers through temporary employment agencies. All these different kinds of employees are generally called 'posted workers'. At the present moment there are estimated 1 million posted workers in the EU[86].

The term 'posted worker' is in international use and can relate to many types of workers. In community law it refers both to EU and non-EU nationals. According to Directive 96/71/EC of the European Parliament and of the Council, 'posted worker' means 'a worker who, for a limited period, carries out his work in the territory of a Member State other than

[84] Barnard 2006, p. 294.
[85] Houwerzijl 2006, p. 179.
[86] Press release "EU calls for urgent action to improve working conditions for 1 million posted workers", IP/08/514, Brussels, 3 April 2008. Available at: http://ec.europa.eu/employment_social/labour_law/docs/IP-08-514_EN.pdf. Cited on 6 October 2008.

the state in which he normally works'[87]. Thus, in order to be classified as a posted worker, one has to be in an employed relationship and sent by his or her employer to work in a state different to the habitual state of employment. Additionally, the work in another Member State has to be carried out only on a temporary basis. Such a situation arises, for example, when a service provider wins a contract in another country and sends its employees there to carry out the contract.

As in all transnational situations, in posting of workers the question often arises as to which law is applicable to the employment relationship. The need to promote the smooth functioning of the internal market was the underlying reason when the Member States concluded the Rome Convention of 1980 on the law applicable to contractual relations[88]. The said convention unified the national rules concerning the choice of law in various contractual relations, including employment relations. The aim was to establish common rules with regard to choice of law and thus increase predictability in international commerce and contribute to the development of the internal market.[89] Considering the complexity and vagueness of the Convention's provisions[90], it is not surprising that the Member States decided to take further action with regard to the choice of mandatory rules applicable to cross-border employment relationships. Although the adopted legislative instrument does not change the Rome Convention's basic principle of choice of law, it identifies the relevant mandatory rules of the host state to be complied with while posting workers to that state. I shall now turn to examine Directive 96/71/EC[91] concerning the posting of workers in the framework of the provision of services. Although the Directive was a welcome answer to a tangled situation of conflicting norms of employment, we will see that it has anything but reduced the European debate over the issue.

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[87] Directive 96/71/EC of the European Parliament and of the Council, OJ L 18, 21.1.1997, p. 1–6, Art. 2.
[88] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266, 9.10.1980, p. 1–19. The Convention has recently been replaced by a Regulation that the Council and the Parliament adopted on 17 June 2008[88]. The so-called Rome I Regulation on the law applicable to contractual obligations shall apply from 17 December 2009.
[89] Liukkunen 2002, p. 36.
[90] See Davies 1997, p. 579 and Liukkunen 2002, p. 139 that have a differing view on the relationship between the articles of the Rome Convention and the mandatory rules laid down in the PWD.
[91] Directive 96/71/EC of the European Parliament and of the Council, OJ L 18, 21.1.1997, p. 1–6.

3.2 The Directive on Posting of Workers

3.2.1 The Legal Basis

When it comes to the case law concerning the posting of workers, an important dividing factor is the existence, or non-existence, of the Posted Workers' Directive ('PWD'). The Directive's meaning is to make sure that all undertakings providing their services in other Member States apply the host state's legislation relating to the most important provisions of labour law notwithstanding the law otherwise applicable to the employment relationship. The Council and the Parliament adopted the Directive on 16 December 1996 in accordance with the procedure referred to in Article 251 EC. The Directive's legal bases were Articles 57(2) and 66 of the EC Treaty [now Articles 47(2) and 55 EC]. Article 55 EC extends the application of Articles 45 to 48 relating to freedom of establishment to the freedom to provide services. Article 47(2), for one, provides the Council with the power of issuing Directives for the coordination of provisions laid down in Member States concerning the taking-up and pursuit of activities as self-employed persons. It is thus clear that the legal basis of the PWD is in those Treaty provisions that are designed to facilitate the freedom to provide services within the EU.

When the PWD was adopted, the Government of the United Kingdom contested the legal basis because it held the Directive anti-competitive and troublesome for the operation of the single market for services[92]. Although the Directive was opposed by the United Kingdom and Portugal[93], they were unable to prevent its adoption; the selected legal basis enabled the Directive's adoption by qualified majority voting within the Council. However, in light of the Court's recent rulings on the PWD, the controversy over the legal basis has now ironically turned upside-down. Judging by some Member States' reactions to the Court's interpretations, it is not far-fetched to propose that some of them might now prefer the legal basis of Article 137 EC on Community measures in the social field instead of the market-oriented articles relating to the free movement of services. The change of the legal basis would necessarily demand changes in the Directive's aims and contents too.

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[92] European Industrial Relations Observatory, Comparative study on posted workers: the position in the UK. Available at: <www.eurofound.europa.eu/eiro/1999/09/word/uk9907122s.doc>. Cited on 25 October 2008.
[93] United Kingdom voted against the Directive in the Council, while Portugal abstained. Hellsten 2007, the second article, p. 17.

Another option would have been to base the PWD on Article 94 EC, which gives the Council, when acting unanimously, the power to approximate conflicting national laws for the better functioning of the common market. Article 94 EC has served as the legal basis for some very important directives in the social field, dealing with issues such as transfers of undertakings, collective dismissals and insolvencies[94]. However, basing the PWD on Article 94 EC would have been contradictory to the Directive's purpose that is not meant to harmonise anything; the PWD is based on mere coordination as it only identifies those national rules that must be followed with respect to posted workers. Moreover, the PWD is clearly connected to the facilitation of the internal market in services, for which Article 47(2) EC lays down the rules in a more detailed manner. In *UK v Council*[95] the Court held that the choice of legal basis must be based upon objective elements subject to judicial control. That is even more so when alternative legal bases entail different rules regarding the manner in which the institutions may arrive at a decision. In particular, the legal basis must reflect the purpose and contents of the act concerned[96]. Considering the nature of the PWD as a coordinating instrument, Article 47(2) was probably the most accurate basis, despite the strong implications the PWD has for the protection of workers. The said provision was also a very practical choice as it allowed for the Directive's adoption by qualified majority voting; otherwise it might not have been adopted at all. The Member States could have hardly reached any consensus had the Directive been something else than an instrument of coordination, had it for example tried to provide posted workers with substantive rights[97].

3.2.2 The Field of Application

For a person who wants to earn his living in another Member State than his state of origin, the EC Treaty offers three options to do so. Firstly, a person can move to another Member State as an employed worker basing his right of free movement on Article 39 EC. Secondly, based on Article 43 EC he may establish himself in another Member State as self-employed. And thirdly, although keeping his or his company's place of establishment in

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[94] Blanpain 2003, p. 145.
[95] Case 68/86, *UK v Council* [1988] ECR 855, para. 6, 24.
[96] Hellsten 2004, p. 92.
[97] Kolehmainen 1998, p. 14. *Kolehmainen* presents the PWD as a 'functional alternative to harmonisation'.

one Member State, he may participate in the provision of services in other Member States in accordance with Article 49 EC.[98] The PWD applies only to the last situation, in which it provides for three different kinds of ways to relocate one's employees in other Member States. Firstly, it applies to those undertakings that post workers to the territory of another Member State on their account and under their direction based on a contract concluded between the undertaking making the posting and the party for whom the services are intended. Secondly, the Directive applies to undertakings that post workers to an undertaking that is owned by the same group. Thirdly, the Directive also applies to temporary employment agencies that hire out workers to a user undertaking established in the host state. In all three cases the key feature is the employment relationship existing between the posted worker and the undertaking that is providing the service during the whole period of posting.[99]

The PWD becomes applicable only in connection with transnational provision of services between the Member States. Such a situation is at hand when an undertaking provides its services in another state for a limited period of time[100]. The Directive, however, does not provide any maximum length of posting. Article 3(6) only states that the length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting.[101] According to the same article, account shall be taken of any previous periods for which another posted worker has filled the same post. The latter provision could in principle suggest that postings are limited to a period of one year. However, the only clearly defined time limits of the PWD concern the possibilities to deviate from certain terms and conditions of employment of Article 3(1) when the length of the posting does not in some specific cases exceed eight days or one month, or when the amount of work to be done is not significant[102]. Most Member States would probably not take advantage of these derogations provided by the Directive, as it is usually not in the host state's interest to exempt service providers from the domestic rules[103].

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[98] Bruun 1998, p. 223.
[99] PWD, Article 1(3).
[100] On the duration of the activity, see section 2.2.1 above.
[101] Liukkunen 2004, p. 180.
[102] PWD, Article 3, para. 2–5.
[103] Barnard 2006, p. 288.

Besides the PWD, a further set of rules applicable to posted workers is based on the Social Security Regulation 1408/71[104]. The Regulation has recently been replaced, for most purposes, by Regulation 883/2004[105]. However, the new Regulation will only come into force when an implementing Regulation[106] is adopted. The provisions of both Regulations on posting form an important exception of the Regulations' general principle of *lex loci laboris*[107]. Such an exception is essential in the facilitation of free movement between the Member States, as otherwise even short postings would require the changeover to a different social security system. Article 14(1)(a) of Regulation 1408/71 allows for a posting duration of 12 months, which subject to the consent of the host state may be extended for another 12 months. Article 17 provides for an even longer period of posting in cases where two or more Member States reach a common agreement in the interest of certain workers or categories of workers. According to *Bruun*, such agreements amongst Member States are very common, with most of them providing for a posting period of five years.[108] According to the new Regulation 883/204 a posted worker shall continue to be subject to the legislation of the Member State of origin provided that the anticipated duration of posting does not exceed twenty-four months. The PWD, however, is not expressly bound by the threshold periods of the Social Security Regulations. Thus, it has to be concluded that the meaning of a 'limited period' of posting is left for the Court to decide[109].

In general, it should be kept in mind that the PWD does not provide for any rules regarding the choice of law; such rules are covered by the Rome Convention instead[110]. The PWD does not determine the *lex causae* of the employment relationship, but merely requires the application of the core provisions of the host state's labour law. Hence, the PWD narrows down the latitude of the Rome Convention in those situations where the *lex causae* is not

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[104] Regulation (EEC) No 1408/71 of the Council of 14 June 1971, OJ L 149, 5.7.1971, p. 2–50. However, the concept of posting in the PWD and in the Regulation is not identical. See Bruun 1998, p. 231.
[105] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004, OJ L 166, 30.4.2004, p. 1–123.
[106] See Commission proposal for the implementing Regulation, COM (2006) 16 final.
[107] The principle means that the social security provisions of a Member State are applied to a worker coming to work in that state from the very beginning of the working period.
[108] Bruun 1998, p. 229–231.
[109] Liukkunen 2004, p. 180.
[110] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266, 9.10.1980, p. 1–19.

the law of the host state[111]. The PWD also tightens the Member States' role in the choice of law by obliging them to apply the core provisions laid down in the Directive to undertakings posting workers to their territory.[112] In accordance with Article 3(7) and Recital 17 of the Directive, the mandatory rules for minimum protection in force in the host country must however not prevent the application of terms and conditions that are more favourable to workers. The host state's central terms of employee protection are therefore to be disregarded only in cases where the otherwise applicable law of another state is more favourable for the employee.

All in all it is worth reminding that the field of application of the PWD is strictly limited to temporary posting within the provision of services between the EU Member States. The Directive applies only to the narrowly formulated transnational situations of Article 1(3). For example workers seconded to another Member State to render services to the sending undertaking do not belong to any of the Directive's categories. It follows that a significant amount of international work that is done in the EU is left to be regulated by the Rome Convention and soon by the new Rome I Regulation.[113]

3.2.3 The Hard Core of Terms and Conditions of Employment

According to Article 3(1) of the PWD Member States shall ensure that all undertakings fulfilling the criteria laid down in Article 1(3) of the Directive guarantee their posted workers the terms and conditions of employment covering the matters listed in the same article. The matters covered are:

> (a) Maximum work periods and minimum rest periods;
> (b) Minimum paid annual holidays;
> (c) The minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
> (d) The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
> (e) Health, safety and hygiene at work;

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[111] This is possible since Article 20 of the Rome Convention confirms the precedence of Community law in relation to choice of law rules relating to contractual obligations in particular matters.
[112] Ibid., p. 138–139.
[113] Liukkunen 2001, p. 877. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, OJ L 177, 4.7.2008, p. 6–16.

> (f) Protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
> (g) Equality of treatment between men and women and other provisions on non-discrimination.[114]

The Directive's aim is to identify the applicable rules and make them binding on all posting undertakings[115]. The obligation to ensure the application of such rules is clearly imposed on the host state, which also has the natural interest to protect the domestic system of labour law regulation[116]. It is however important to note that the PWD is an instrument of exhaustive harmonisation only with regard to the composition of terms and conditions of employment it seeks to guarantee for all posted workers. Member States remain free to determine the material contents of those terms and conditions as long as they have not been harmonised at the Community level[117]. Furthermore, if a Member State does not have legislation on some of the matters, it is under no obligation to make such provisions. For example, minimum wages are in many Member States determined by collective agreements, not by legislation. According to the Commission's and the Council's statements of entry on the PWD[118], Article 3 does not entail any obligation on Member States to make provision for such wages. Consequently, the PWD does not contribute to any greater convergence of terms and conditions of employment in the common market[119].

The mandatory rules listed in Article 3(1) can be laid down by law, regulation or administrative provision. In the case of building work[120], the terms and conditions can be laid down by law, regulation or administrative provision and/or by collective agreements or arbitration awards, which have been declared 'universally applicable'. The system of universal application of collective agreements means such agreements that 'must be

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[114] PWD, Article 3(1), first subparagraph.
[115] COM (2003) 458 final, p. 7.
[116] Davies 1997, p. 577.
[117] See case C-490/04, *Commission v Germany III* [2007] ECR I-6095, para. 19. It has to be noted that the working conditions set out in Article 3(1) largely correspond to the areas in which Community legislation has already been passed or proposed (See Barnard 2006, p. 288). The most significant non-harmonised exception of the terms and conditions of employment is the minimum pay. However, as *Hellsten* notes, the Community legislation on working conditions lays down only minimum requirements, which means that Member States remain free to impose higher standards also to posted workers. Hellsten 2007, the second article, p. 32.
[118] Council document No 10048/96 SOC 264 CODEC 550, Brussels, 20 September 1996, Statement No 5.
[119] Blanpain 2003, p. 328.
[120] The Directive includes as an annex a list of activities that may be considered as 'building'. However, according to Article 3(10), second indent, Member States may extend the application of collective agreements or arbitration awards also to activities outside the building sector on a basis of equality of treatment towards national undertakings and undertakings from other states.

observed by all undertakings in the geographical area and in the profession or industry concerned'[121]. Article 3(8) also provides for another type of collective agreements for those countries where no system of universal application exists[122]. Such Member States may, if they so decide, base themselves on 'collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned'. An alternative option is to base the national system on collective agreements that have been concluded by the most representative employers' and labour organizations at national level. Such agreements have to be applied throughout national territory. An additional requirement relating to both of these options is the equality of treatment between posting undertakings and domestic undertakings. Equality of treatment is deemed to exist when national undertakings in a similar position are subject to the same obligations as posting undertakings with regards the matters of employment listed in the Directive and when they are required to fulfil such obligations with the same effects.

Concerning the Member Sates' possibility to base themselves on collective agreements or arbitration awards which are not universally but generally applicable to all similar undertakings, the second subparagraph of Article 3(8) includes an important addition 'if they so decide'. According to the Commission, it means that Member States must make an explicit mention thereof in their implementing legislation if they wish to rely on the said provision[123]. It is interesting to note that at least the Finnish language version of the Directive does not include the clause 'if they so decide'[124]. As is the case with many other provisions of the Directive, it is not clear what Article 3(8) exactly means. In any case, the Commission has stated that "if their implementing legislation makes no reference to this effect [to the use of the possibility provided for in the second subparagraph of Article 3(8)], Member States may not oblige undertakings established in another Member State which post workers to their territory to observe the collective agreements referred to in the second

[121] PWD, Article 3(8), first subparagraph.
[122] According to the Commission, this is the situation in Sweden, Denmark and the United Kingdom. Most Member States' legislations, however, provide for the application or extension of universally applicable collective agreements to posted workers. See COM (2003) 458 final, p. 9.
[123] COM (2003) 458 final, p. 12. This has been confirmed by the Court. See case C-341/05, *Laval* [2007] ECR I-11767, para. 66.
[124] In the course of the study the English, French, German, Spanish, Italian, Dutch, Swedish, Danish, Polish, Estonian, Slovenian and Finnish language versions were reviewed. From these languages the Finnish version was the only one that did not contain an explicit reference to the need to make a decision.

subparagraph of Article 3(8).[125]" Thus the Commission does not seem to approve the obligation to apply collective agreements that are not in accordance with the Directive. The Court's stand is not exactly the same as it has stated that since the purpose of the PWD is not to harmonise systems for establishing terms and conditions of employment in the Member States, the states are free to choose a system at the national level which is not expressly mentioned among those provided for in the Directive[126]. According to the Court, the method of implementation is thus free as long as it does not hinder the freedom to provide services between the Member States[127]. The Court's view is understandable considering Article 249 EC, according to which a directive is binding only as to the result to be achieved. The choice of form and method of implementation is left for the national authorities to decide. This enables Member States to take into account national peculiarities and other circumstances when implementing directives[128].

In addition to the controversy over the applicability of collective agreements, another question is whether the Member States have the possibility to apply terms and conditions of employment *other* than those listed in Article 3(1) of the Directive. This has been the viewpoint of many Member States when they have argued for the right to increase the number of applicable terms and conditions of employment outside the mandatory list of the Directive. The view might be supported by Article 3(10), first indent, which states that the Directive does not preclude the application of terms and conditions of employment on matters other than those referred to in the mandatory list of Article 3(1) in the case of public policy provisions[129]. In its Communication on the implementation of the PWD, the Commission said that several Member States have made use of that option and are applying to posting undertakings additional terms and conditions of employment[130]. The

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[125] COM (2003) 458 final, p. 12. Moreover, the Commission concludes that since no Member State's transposing legislation makes any mention of the option offered by the second subparagraph of Article 3(8), those Member States without universally applicable collective agreements do not apply the terms and conditions of employment laid down in collective agreements to workers posted on their territory. In those countries it is therefore only the terms and conditions laid down in legislative provisions that apply.
[126] Case C-341/05, *Laval* [2007] ECR I-11767, para. 68.
[127] However, the Court's reasoning's result might be the same as the Commission's: in practice this notion probably requires the national system to provide for a similar level of legal certainty in the cross-border provision of services as universally or generally applicable collective agreements do.
[128] Prechal 2005, p. 73.
[129] However, according to the same article, such application has to be in compliance with the Treaty and conducted on a basis of equality of treatment between national and foreign undertakings. The requirement of 'compliance with the Treaty' indicates perhaps the drafter's awareness of potential conflict between Article 3(10) and Articles 49 and 50 EC. See Davies 1997, p. 593.
[130] COM (2003) 458 final, p. 9.

ECJ, however, has taken a contradictory stand in its recent ruling in *Laval* where it said that the PWD expressly lays down the degree of protection the Member States are entitled to require posting undertakings to observe[131].

3.2.4 The Aims of the Directive

According to the Commission's Communication on the implementation of the Directive, the PWD aims to abolish obstacles and uncertainties impeding the freedom to provide services by improving legal certainty and facilitating the identification of employment conditions applied to posted workers[132]. One should not, however, restrict the aims of the PWD to the ones expressed by the Directive's legal basis. It seems obvious that the PWD also has social aims to attain. This is manifested by the preamble to the Directive, which states that the Directive was intended to promote the transnational provision of services in a 'climate of fair competition' while 'guaranteeing respect for the rights of workers'[133]. The PWD is thus also aimed at the protection of workers and prevention of social dumping. It co-ordinates the labour legislation in Member States by laying down a list of mandatory rules that foreign undertakings must respect when assigning their employees to work in another Member State. According to the Commission, the ultimate objective of the Directive is to strike a balance between the economic freedom to provide services and employees' rights during their period of posting[134].

The Directive's necessary double aim, in which the protection of workers is not weaker to the promotion of free trade, has been supported by the Community's inevitable responsibilities with regard to social policy. One should not overlook the employment-related aspects of the EC Treaty principles, especially the commitment to 'a high level of employment and social protection' as expressed in Article 2 EC[135]. However, from the very beginning the problem has been the secondary role the social questions have played with respect to the Community's economic policy. The Treaty of Rome did not originally contain many provisions on social and labour market policy. With the exception of Article

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[131] Case C-341/05, *Laval* [2007] ECR I-11767, para. 80–81. I shall examine the case *Laval* and related issues in more detail in Chapter 4.
[132] COM (2003) 458 final, p. 3.
[133] The Preamble to the PWD, Recital 5.
[134] COM (2003) 458 final, p. 3.
[135] Neal 2002, p. 1.

119 EEC [now Article 141 EC] relating to equal pay, these provisions were closer to political manifestos than legally binding rules. The only practical achievements in the field of social policy between 1957 and 1974 were the implementation of freedom of movement for migrant workers with the social security arrangements associated to that freedom, and the establishment of the European Social Fund. In 1974 the Council adopted the First Programme of Social Action[136], emphasising the need to ensure close co-operation in the social field. Since the 1974 Social Action Programme, the Community has been increasingly active with relation to labour law and working conditions. The years between 1974 and 1980 have been labelled by some as 'the golden period of harmonisation'[137]. The aims of the Action Programme were pursued by the adoption of various directives relating to equal opportunities, health and safety at work and other working conditions. However, the 1980s was a decade of deregulation as flexibility became the slogan in the battle against the economic crisis and growing unemployment. The White Paper of 1985[138] concerning the attainment of a single market by the end of 1992 established purely economic objectives and had a distinctly deregulatory bias.[139]

During the past decades there has been a growing concern with the lack of social dimension in the construction of the common market. The EC Treaty still contains only a few concrete competences for the creation of a genuine social and labour law policy[140]. The Single European Act of 1986 introduced the first autonomous legal basis for social policy measures: Article 118a EEC [now part of Articles 137 and 138 EC] concerning minimum requirements for health and safety at work. The Council could from now on adopt measures on working environment by qualified majority vote and in co-operation with the European Parliament. 10 years later the Community competence in the field of employment and social policy was further expanded by the Treaty of Amsterdam that incorporated the 1992 Agreement on Social Policy[141] into Articles 136–145 EC. The Treaty of Nice for its part introduced the new Article 144 EC on the Social Protection Committee. On the whole the progress in the social field has been incremental, as it has

[136] Council Resolution of 21 January 1974, OJ C 013, 12.2.1974, p. 1–4.
[137] Blanpain 2003, p. 179.
[138] Completing the Internal Market: White Paper from the Commission to the European Council, COM (85) 310 final, 14.6.1985, not published in the Official Journal.
[139] Blanpain 2003, p. 179–181.
[140] Ibid., p. 132.
[141] The Agreement on social policy was concluded between the Member States with the exception of the United Kingdom and Northern Ireland and annexed originally as a Protocol to the Treaty on European Union.

been challenging for Member States with different welfare regimes and values to reach the often-required unanimity[142]. However, since the first Social Action Programme in 1974 the Community's focus has shifted markedly towards a more socially oriented approach. An important element in that approach is to protect workers against the consequences of an increasingly deregulated labour market[143]. In 1989 a significant step was taken with the adoption of a Community Charter of fundamental social rights for workers[144], exactly 200 years after the French Universal Declaration of Human Rights. Although the Charter is not legally binding, it is meant to inspire the future social and labour law policies of the Community[145].

In the light of the legislative measures taken in the field of social policy, it might seem clear that the PWD is only a continuation to this process. All directives in social fields have multiple aims: they are to provide for equal competition for all European undertakings and at the same time they are to protect workers. Considering the wording of the Treaty's social articles it is clear that the social policy has to be non-inflationary and geared towards maintaining the competitiveness of the European economy[146]. However, one has to keep in mind the exceptional nature of the PWD, the legal basis of which is not in the social policy chapter. Its main purpose is to provide for equal opportunities in the cross-border provision of services. Naturally, due to the demands of the Member States the level of worker protection is high considering the long list of terms of employment that need to be respected, but that is only a consequence of the sensitive issue the Directive is dealing with. Moreover, it should be noted that not all working conditions are covered and therefore the PWD combats social dumping only to some extent[147]. The main objective of the Directive remains the same: to give foreign undertakings clear indications with regard to the rules they have to obey when providing services in another Member State.

Support for this argumentation can be found within the ECJ. In his opinion on *Laval*, Advocate General Mengozzi gave a clear indication on how the relationship of the PWD and Article 49 EC should be interpreted. According to him "a measure that is incompatible

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[142] Kvist and Saari 2007, p. 5.
[143] Neal 2002, p. 428.
[144] Community Charter of Fundamental Social Rights, preliminary draft, COM (89) 248 final, 30.5.1989, not published in the Official Journal.
[145] Blanpain 2003, p. 181.
[146] See Articles 2, 126(1) and 136(3) EC.
[147] Blanpain 2003, p. 328.

with Directive 96/71 will, a fortiori, be contrary to Article 49 EC, because that Directive is intended, within its specific scope, to implement the terms of that article"[148]. The Court has taken a similar stand by concluding that when a failure to fulfil obligations on the basis of the PWD has been established, it is unnecessary to examine the situation in respect of Article 49 EC[149]. Most recently the Court held that the interpretation of the PWD is confirmed by reading it in the light of Article 49 EC, since the PWD in particular seeks to bring about the fundamental freedom to provide services[150]. Considering the stand taken by the Court, there remains little scope for such national requirements that are not in accordance with the Directive. However, a certain margin remains where the national system is not expressly banned by the Directive but when it nonetheless forms a restriction to the freedom to provide services[151]. In such a situation it is primarily Article 49 EC and not the Directive that provides the answer. In the following chapter the different interpretations of the PWD and Article 49 EC in the field of posting are examined more thoroughly in the light of the Court's case law.

[148] Opinion of Advocate General Mengozzi in the case C-341/05, *Laval* [2007] ECR I-11767, para 149. It is interesting to note that notwithstanding this statement in his opinion on *Laval*, Advocate General *Mengozzi* reached a very different conclusion than the ECJ.
[149] Case C-341/02, *Commission v Germany I* [2005] ECR I-2733, para. 42.
[150] Case C-346/06, *Rüffert* [2008], the judgment of 3 April 2008, not yet published in the ECR, para. 36.
[151] See case C-60/03, *Wolff & Müller* [2004] ECR I-9553, para. 30, 45.

4 Case Law on Posted Workers: Social Dumping or Protection of Workers?

4.1 The Court and Posted Workers

During the past twenty-five years the ECJ has played an important role in developing Community law rules concerning posted workers. Although the Court has accepted the application of host state's labour law to posted workers, it has also abandoned many protectionist national rules in favour of the promotion of an internal market, especially the freedom to provide services. The public and academic reactions to the Court's rulings on posted workers have varied from being praising to critical, often demonstrating the commentators' general attitude towards the direction the EU is heading. Moreover, a new type of confrontation has emerged among Member States, especially between the old Member States and those that are the last ones to join the Union.

In general, a careful and often critical attitude is dominating whenever a case concerning sensitive social issues is brought before the Court. However, considering the Court's general attitude of appreciation towards human rights and recognition of social objectives one can wonder why the Court has encountered such exceptionally heavy criticism when it comes to its rulings on posted workers. Furthermore, the most vigorously criticised judgments on posted workers, *Laval*[152] and *Rüffert*[153], were based on a directive, the PWD, which the Member States themselves had chosen to legislate in co-decision with the European Parliament. These judgments have prompted an unprecedented wave of upheaval especially in those Member States were collective bargaining plays a crucial role in the field of employment. They might even have played an important role in the future of the Lisbon Treaty when the Irish electorate decided to vote for the negative. Shortly before the elections, the Irish Government's official campaign was undermined by the decision of a major trade union to speak out against the Treaty. The general secretary of the union cited three judgments of the ECJ, *Laval*, *Rüffert* and *Viking*[154], which he said had shown that "the pendulum had swung against workers' rights and in favour of big business"[155]. In

[152] Case C-341/05, *Laval* [2007] ECR I-11767.
[153] Case C-346/06, *Rüffert* [2008], the judgment of 3 April 2008, not yet published in the ECR.
[154] Case C-438/05, *Viking* [2007] ECR I-10779.
[155] Mahony, Honor, "EU Court Judgements affecting Irish treaty campaign", EUobserver.com, 6.5.2008. Available at: <http://euobserver.com/9/26086?rss_rk=1>. Cited on 5 October 2008.

these circumstances, according to this influential man in Ireland, it would be foolish to provide the institutions of the European Union with any more power.

In this chapter the centre of focus is particularly on the recent judgment *Laval*, which has shed an entirely new light on the Posted Workers' Directive and the way it should be interpreted. In addition, a historic outline on the case law on posted workers shall be presented in order to examine how the Court has balanced the two conflicting interests: the protection of workers and the promotion of an internal market. The underlying question of this thesis is whether the Court has used its powers basing itself on the Community's legislative instruments or whether it has gone further by creating new law based on a somewhat far-reaching interpretation of the Treaty articles on the fundamental freedoms.

4.2 The Arising Need for Legislation on Posting

The Court's case law on posted workers started to develop at a time when the dynamic environment created by the single market was encouraging a growing number of undertakings to embark on transnational activities. The situation of posted workers in the provision of services was constantly raising new legal questions relating to Community rules. Many Member States were particularly concerned about the cheap migrant labour's threat to their system of employment law and were anxious to preserve the national rules on wage setting and worker protection. In its case law before the enactment of the PWD, the Court recognised the Member States' concerns by ruling that:

> " -- Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means[156]".

Seco and Desquenne[157] of 1981 was the first case in which the Court had to commit itself on the matter. The case concerned a request for a preliminary ruling by the Cour de Cassation of Luxembourg[158]. The referring court wanted to know whether an undertaking

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[156] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417, para. 18.
[157] Joined cases 62/81 and 63/81, *Seco and Desquenne* [1982] ECR 223.
[158] In general it has to be noted that all discussed cases before the adoption of the PWD have come to the Court under the procedure of Art. 234 EC concerning the Court's jurisdiction to give preliminary rulings.

from another Member State posting its workers to Luxembourg could be required to pay social security contributions in the same way as national undertakings. The relevant factor was that the posting undertaking was already subject to somewhat similar requirements in its state of origin. Furthermore, the posted workers concerned could not benefit from the additional social security contributions made by their employer in Luxembourg. The ECJ started its reasoning by stating that Treaty provisions on free movement prohibit not only discrimination on grounds of nationality but all forms of covert discrimination which, although based on apparently neutral criteria, in practice lead to the same result[159]. According to the Court, a discriminatory situation arises if a host state does not take into account the contributions a posting undertaking has already paid in its state of establishment. Furthermore, social security contributions could not be justified in the case at hand since they did not relate to any benefit for the posted workers themselves[160]. When addressing the application of minimum pay to the posted workers, the Court gave the above-mentioned statement on the extension of the host state's labour law rules to posted workers; a statement it has constantly repeated since[161]. In *Seco and Desquenne* the Court, however, pronounced on the extension of domestic legislation and collective agreements relating to minimum wages only, whereas in later rulings the extension has not been limited in that respect. To put together the findings of *Seco and Desquenne*, it resulted that although the requirement concerning the employers' share of social security contributions was precluded, the Court allowed the application of the host state's minimum wages to all workers posted to its territory.

In later cases *Rush Portuguesa*[162] and *Vander Elst*[163] the question put before the Court concerned the host state's requirement to obtain work permits for posted workers who were not nationals of any Member State. The Court rejected the work-permit rule but gave at least some words of comfort to the Member States by acknowledging the possibility to apply domestic labour standards to posted workers[164]. Since *Rush Portuguesa* did not contain any limitation on minimum wages only, in this judgment the Court gave Member States a broad power to apply their labour standards to workers posted to their territory. In

[159] Joined cases 62/81 and 63/81, *Seco and Desquenne* [1982] ECR 223, para. 8.
[160] Ibid., para. 10.
[161] Ibid., para. 14.
[162] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417.
[163] Case C-43/93, *Vander Elst* [1994] ECR I-3803.
[164] Davies 1997, p. 589.

Arblade[165] the Court ruled that collective agreements could be applied to guest service providers, provided that the provisions of such agreements were sufficiently precise and accessible and they did not render it impossible or excessively difficult in practice for the employer to determine his obligations in the host state. In *Finalarte*[166] the Court made clear that the application of collective agreements is not allowed when the agreements differentiate between domestic and foreign undertakings. The case concerned the German scheme for paid leave to which all foreign employers had to contribute while not all domestic employers were subject to the same treatment. The Court declared the unexceptional application of collective agreements to foreign undertakings inadmissible as a discriminatory restriction of Article 49 EC. In *Portugaia Construções*[167] the Court held that unequal treatment arises also when by concluding a collective agreement specific to one undertaking, a domestic employer can pay lower wages than foreign employers who are always subject to the minimum wage of generally applicable collective agreements.

In its case law on posting before the PWD became applicable at the end of 1999, the Court resorted to its general formula applicable to the evaluation of restrictions on the freedom to provide services. As a first step, in the spirit of *Säger*[168] and *Gebhard*[169], the Court would usually state that Article 49 EC requires the abolition of any restriction, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services. With this regard the Court held that the application of the host Member State's domestic legislation to service providers was capable of creating a restriction to the extent that it involves expenses and additional administrative and economic burdens[170]. Secondly, the Court would note that the freedom to provide services could be restricted only by rules justified by overriding requirements relating to the public interest, such as the protection of workers[171]. Objectives of economic nature, such as the protection of national undertakings, were not justified[172]. Thirdly, the Court would state that the national rules could be extended to posted workers where it is established that the protection conferred is not

[165] Joined cases C-369/96 and C-376/96, *Arblade and Others* [1999] ECR I-8453, para. 43.
[166] Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and others* [2001] ECR I-7831, para. 76–83.
[167] Case C-164/99, *Portugaia Construções* [2002] ECR I-787, para. 34–35.
[168] Case C-76/90, *Säger* [1991] ECR I-4221.
[169] Case C-55/94, *Gebhard* [1995] ECR I-4165.
[170] Case C-164/99, *Portugaia Construções* [2002] ECR I-787, para. 18.
[171] Joined cases C-369/96 and C-376/96, *Arblade and Others* [1999] ECR I-8453, para. 36.
[172] Case C-164/99, *Portugaia Construções* [2002] ECR I-787, para. 26.

guaranteed by identical or essentially similar obligations by which the undertaking is already bound in the Member State where it is established. Finally, the Court would state or require the national court to confirm whether the steps taken were proportionate with relation to the aim that they were seeking.[173]

The Court's pre-PWD case law on posted workers shows that the host states' requirements varied greatly, being anything from the minimum rates of pay and contributions to the national system providing benefits in case of bad weather in the construction industry[174]. Although the Court rejected many national requirements as excessive, there was a constant need for preliminary rulings as no Community legislation existed on cross-border posting. Difficulties were also arising from the Court's vague instructions to national courts. It was often left for the national authorities to determine whether there was a difference in the level of social protection between the home and the host state. The examination of differing systems of social protection and their comparison with one another was in practice impossible to achieve[175]. The PWD thus provided the necessary response in a situation where the freedom to provide services was seriously compromised by the lack of legal certainty as to which extent national legislation was to be applied. The solution was to lay down a hardcore of terms and conditions of employment applicable to all posted workers. Along with the Directive the situation changed so that from then on there was a list of mandatory rules that *must* be respected. In this way, the Directive went even further than the pre-existing case law, which merely *permitted* Member States to extend certain rules of employment to employees posted to their territory[176].

By having allowed Member States to apply their national rules of employment to workers of guest service providers, the Court on its part had given the green light to the enactment of the PWD[177]. Another option had been to deny the application of national labour rules as too restrictive to the temporary provision of services. Such a position would have been extremely difficult to take, as it had opened the gates to social dumping between Member

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[173] See, e.g. case C-272/94, *Guiot* [1996] ECR I-1905, para. 13–16, joined cases C-369/96 and C-376/96, *Arblade and Others* [1999] ECR I-8453, para. 34–35, joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and others* [2001] ECR I-7831, para. 28–33, and case C-164/99, *Portugaia Construções* [2002] ECR I-787, para. 19–29.
[174] Referring to the system of 'timbres-intempéries' (bad weather stamps) and 'timbres-fidélité' (loyalty stamps) as in joined cases C-369/96 and C-376/96, *Arblade and Others* [1999] ECR I-8453.
[175] Giesen 2003, p. 152.
[176] Barnard 2006, p. 281.
[177] Ibid., p. 277.

States with varying levels of social protection. Both the Court's case law and the PWD actually restrict the freedom to provide services, as they require the out-of-state service provider to adapt its terms and conditions of employment each time it posts workers to another Member State. Therefore it is possible to argue that the PWD has a chilling, rather than promoting, effect on the provision of services in the EU[178]. *Davies* presents the Directive as somewhat of a paradox: since the Court had given the Member States the broad possibility to apply their labour standards to posted workers, the Member States did not have much incentive to produce a directive that would substantially curtail their own powers[179]. Therefore, considering this context, the heavy interference with the freedom to provide services was unavoidable although the Directive's legal basis was in the articles supposed to facilitate that very freedom. Notwithstanding the dubious effect on the freedom to provide services, in a situation where neither the Court nor the Member States were ready to reject the application of local labour rules altogether, the PWD at least provided for greater legal certainty by laying down a definite list of terms and conditions to be applied[180].

4.3 The Commission Takes the Initiative

I shall now turn to the Court's case law on posted workers after the deadline for the implementation of the PWD expired on 16 December 1999. The recent preliminary ruling in *Laval* is presented in the most detailed manner, since it is undoubtedly the most important judgment on posted workers, and especially on the PWD. The first significant post-PWD cases were, however, initiated by the Commission under the procedure of Article 226 EC on a Member State's failure to fulfil obligations. The Commission's activity on monitoring the implementation of the Directive is explained by the very diverse and often questionable systems of application in different Member States[181]. Very soon after the expiry of the PWD's implementation period, it turned out that the obedience of the Directive's provisions was extremely difficult to monitor. As *Weiss* puts it, "the lack of sufficient administrative resources has been confronted with all kinds of strategies invented

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[178] Davies 1997, p. 573.
[179] Ibid., p. 591.
[180] Some Member States have however been arguing that Article 3(10) of the PWD gives them the right to apply terms and conditions of employment also *other* than those that must be guaranteed under Article 3(1). If that argument is accepted, it is difficult to see what connection the Directive has to the facilitation of freedom to provide services. The position has, however, been rejected by the Court in its recent rulings.
[181] COM (2007) 304 final, p. 6–7.

to undermine the rules of the Directive in practice"[182]. For these reasons the Commission has been very productive with publishing detailed communications on the application of the PWD. An emphasis has been especially put on the need to enhance administrative cooperation between national authorities of different Member States[183].

During the past years the Commission has also initiated several infringement proceedings in order to establish what kind of administrative obligations may be required with regard to posted workers. The Court's rulings after the entry into force of the PWD have therefore mostly concerned such national requirements that were not coordinated by the Directive. The Commission's activity in this respect must be seen in the light of the proposed Services Directive [184] that also wished to reject certain administrative obligations concerning posting of workers. While allowing the host Member State to carry out in its territory the necessary checks to ensure compliance with the employment conditions under the PWD, it denied the possibility to ask for any authorisations or declarations prior to posting. Furthermore, the proposal rejected the need to have any representatives or to keep employment documents available in the territory of the host state. The extensive bans on host state inspections were to be accompanied by measures to reinforce the administrative co-operation between Member States[185]. Although at a later stage the suggested provisions on posted workers were turned down and not included in the Services Directive, the Court had already well before that started to reject many administrative obligations as being too restrictive on the freedom to provide services. For this reason, soon after the rejection of the 'Bolkestein proposal' the Commission published its Communication "Guidance on the posting of workers in the framework of the provision of services" that served the purpose of clarifying the current stand of case law with regard to the rejected provisions on posted workers[186]. In its Communication the Commission tells the Member States 'how to observe the Community *acquis* as interpreted by the European Court of Justice with reference to Article 49 EC'[187]. The Commission's message is clear: although all provisions on posted workers were excluded from the Services Directive, Member States should not

[182] Weiss 2007, p. 474.
[183] See especially the Commission's Communication from June 2007 on the monitoring of the PWD's implementation (COM (2007) 304 final) and the recent Commission Recommendation of 3 April 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, OJ C 85, 4.4.2008, p. 1–4.
[184] COM (2004) 2 final/3, Article 24 (the 'Bolkestein proposal').
[185] Barnard 2006, p. 291.
[186] COM (2006) 159 final, p. 3.
[187] Ibid.

consider that they can hang on to the wide range of administrative measures they were applying at the time. Basing its argumentation on the Court's case law, the Commission required Member States to abandon practically all the same measures that were originally part of the 'Bolkestein proposal' for the Services Directive.

One of the cases the Commission was referring to concerned a prior check of the legal situation of posted workers, which was required by Germany[188]. The Court considered such a preliminary check procedure excessive and held that a host state may require a service provider to furnish only a simple prior declaration certifying that the situation of the posted workers concerned is lawful in the home state. Another example of a similar situation is a case against Luxemburg, in which a service provider could be required to report beforehand on the presence of posted workers, while a work licensing mechanism was not an appropriate means of monitoring[189]. Germany was once again in the Commission's firing line in a case[190] from 2007 concerning the obligation of foreign employers to translate into the language of the host Member State certain documents that were required to be kept at the place of work for the duration of the posted workers' stay. According to the Court, that obligation was, however, justified by the social protection of workers, since it enables the host state's authorities to carry out the monitoring necessary to ensure compliance with relevant national provisions[191]. In a very recent ruling from June 2008 the Court established that posting undertakings may not be required to keep employment documents available in the host state after they have ceased to employ workers there[192]. Moreover, a Member State may not require such documents to be retained by an ad hoc agent resident in that state in so far as the documents in question may be held by one of the posted workers[193].

As these cited cases demonstrate, the Court has not always gone as far in the rejection of administrative obligations as the original proposal on Services Directive did[194]. The

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[188] Case C-244/04, *Commission v Germany II* [2006] ECR I-885, para. 41.
[189] Case C-445/03, *Commission v Luxemburg II* [2004] ECR I-10191, para. 30–32.
[190] Case C-490/04, *Commission v Germany III* [2007] ECR I-6095.
[191] Ibid., para. 71–72.
[192] Case C-319/06, *Commission v Luxemburg III* [2008], the judgment of 19 June 2008, not yet published in the ECR, para. 92–93.
[193] Ibid., para. 94.
[194] For example, in its case law the Court has allowed a simple declaration prior to posting whereas the proposed Services Directive rejected the possibility to ask for any declarations. See, e.g., case C-244/04, *Commission v Germany II* [2006] ECR I-885 1, para. 41 and COM (2004) 2 final/3, Article 24.

Court's case law from before and after the enactment of the PWD however shows that Member States are required to limit the application of their national legislation much more than the PWD itself gives reason to expect[195]. Most importantly, the Court has on several occasions underlined that the host state's inspection measures must be in accordance with the principle of proportionality: they must be suitable for achieving the objectives pursued without restricting the freedom to provider services any more than necessary[196].

Another important aspect in the posting of workers relates to methods that are available to Member States for securing that their terms and conditions of employment are respected. With regards this the Court has from the very beginning of its case law on posting acknowledged that Community law does not prohibit Member States from enforcing their labour rules by appropriate means[197]. An important case on the evaluation of 'appropriate means' is the first post-PWD case *Wolff & Müller*[198] from 2004. The case concerned the principal contractor's wage liability. Under the German system a principal contractor functions as a guarantor for obligations concerning the payment of minimum wages to its subcontractors' employees. The ECJ held that such a procedural arrangement ensuring the observance of worker protection is allowed since it benefits posted workers by providing them another obligant who is jointly liable with the primary employer and generally more solvent[199]. The judgment was based on Article 5 of the PWD according to which the Member States are to take appropriate measures in the event of non-compliance with the terms of the Directive. In particular they are to ensure that posted workers have available to them adequate procedures for the enforcement of obligations under the Directive. Regarding this the Court added that in applying that wide margin of appreciation Member States must however at all times observe the fundamental freedoms of movement[200]. Although the primary aim of the national legislation was claimed to be the protection of the national labour market, it was not detrimental as long as the German legislation was

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[195] The Court's case law with this respect will be examined more thoroughly in Chapter 6 since many of the rejected national measures concerned the employment of third-county nationals (non-EU nationals).
[196] Case C-244/04, *Commission v Germany II* [2006] ECR I-885, para. 36 and case C-445/03, *Commission v Luxemburg* [2004] ECR I-10191, para. 40.
[197] Joined cases 62/81 and 63/81, *Seco and Desquenne* [1982] ECR 223, para. 14 and case C-113/89, *Rush Portuguesa* [1990] ECR I-1417, para. 18.
[198] Case C-60/03, *Wolff & Müller* [2004] ECR I-9553. Unlike most of the cases after the entry into force of the PWD, *Wolff & Müller* was a reference for a preliminary ruling, not an action brought by the Commission.
[199] Ibid., para. 40. At the same time it renders the provision of construction services in Germany less attractive for foreign undertakings since German contractors have to carry out particularly intensive checks and obtain evidence from foreign subcontractors before signing a contract with them. See para. 14.
[200] Ibid., para. 30.

also capable of protecting posted workers[201]. Importantly, the Court noted that there is not necessarily any contradiction between the objective of upholding fair competition on the one hand and ensuring worker protection, on the other. According to the Court, the possibility to pursue those two objectives concomitantly is demonstrated by the PWD itself as it lays down the double object of fair competition and respect for the rights of workers[202].

Many warmly welcomed the Court's ruling in *Wolff & Müller* since it improved the possibilities to enforce minimum wages in the cross-border provision of services. The shock effect was therefore considerable when the Court, four years later, in another German case *Rüffert,* ruled out the possibility to use labour clauses in public contracts as a means to enforce local minimum wages. The *Rüffert* case should, however, be considered in light of the specific facts of that case. The same concerns the ruling in *Laval* that was given just a few months earlier. In neither of these cases did the Court reject the extension of minimum wages altogether. The conclusions reached in *Rüffert* and *Laval* were based on the Court's estimation of the method that was used for confirming local minimum rates of pay; that method was in a clear conflict with the PWD. The 'problem' with these two judgments is that the legal reasoning behind them is of such a detailed and complicated level that they have become the easy target of erroneous and misleading interpretation in the public eye.

4.4 The PWD Turns into a Trojan Horse

4.4.1 The Facts of *Laval*

I shall now turn to undoubtedly the most controversial judgment of the ECJ concerning posted workers and their terms of employment under the PWD. The *Laval*[203] case, or *Vaxholm* as it is also often called, concerns an industrial action that the Court declared inadmissible under Article 49 EC and Article 3 of the PWD. In May 2004, just after Latvia had entered the EU, a Latvian company Laval un Partneri Ltd ('Laval') posted around 35 workers from Latvia to work on a construction site in the town of Vaxholm, not far from

[201] Ibid., para. 38, 41. The ECJ however left the proportionality test, as it often does, for the national court.
[202] Ibid., para. 42.
[203] Case C-341/05, *Laval* [2007] ECR I-11767.

Stockholm. The construction site was operated by L&P Baltic Bygg AB, a Laval's subsidiary established in Sweden. In June 2004 the Swedish building workers' union ('Byggnads') contacted Laval and its subsidiary with a view to concluding a collective agreement covering the work done in Vaxholm. Notwithstanding a number of negotiation attempts, no agreement was reached since Laval did not agree to an hourly wage of 145 SEK (approximately 16 euros) that was based on average wages of professionally qualified builders and carpenters in the region of Stockholm. If a collective agreement had been signed, Laval would also have been bound by a number of other obligations, including pecuniary obligations payable to the trade union and to a Swedish insurance company. In the meantime Laval had signed a collective agreement with the Latvian building sector's trade union. Since the negotiations with the Swedish trade union were not successful, the union initiated industrial action in the form of a ban on all building and installation work on Laval's construction site. A little later the ban was supported by sympathy actions, as a result of which Laval was no longer able to carry out its activities in Sweden. Consequently, the town of Vaxholm terminated the contract with the Laval's Swedish subsidiary and in March 2005 the latter was declared bankrupt.[204]

Laval commenced proceedings before the Swedish Labour Court claiming that the collective action was illegal. It also petitioned for an interim injunction, which was dismissed by the Labour Court since both the primary and secondary actions were lawful under Swedish law. After the main hearing the Swedish Labour Court referred the case to the ECJ for a preliminary ruling under Article 234 EC. The Labour Court's first question concerned the relationship between the free movement of services and the right to undertake industrial action considering that the national legislation has no express provisions concerning the application of terms and conditions of employment laid down in collective agreements. The second issue at stake was the Swedish legislation on social peace between industrial partners (in particular, the so called 'Lex Britannia') and its possible non-conformity with Community law.[205]

For understanding the case it is crucial to make a few notes about the collective labour law model in Sweden where, as in other Scandinavian countries, a large part of the basic employment protection stems from collective agreements. An important feature of the

[204] Ibid., para. 27–38. See also Malmberg and Sigeman 2008, p. 1122–1123.
[205] Case C-341/05, *Laval* [2007] ECR I-11767, para. 39–41.

Scandinavian model is the lack of any statutory minimum wages; the rates of pay are negotiated between social partners. General application of collective agreements beyond the scope of the agreement's signatories is used only in Finland and Norway, whereas Sweden and Denmark do not have any system of universal or general application of collective agreements in the meaning of Article 3(8) of the PWD.[206] The Swedish system may be described as the 'autonomous collective agreements model' in which it is for trade unions to safeguard the general level of wages and employment conditions, by means of collective action if necessary. Those domestic or foreign employers that do not belong to any employers' organisation are required to conclude 'accessory agreements'. By such an agreement the employer undertakes to apply the collective agreement covering the branch of activity in question.[207] When Sweden implemented the PWD, the decision to refrain from the possibilities provided under Article 3(8) was deliberate because the government wanted to preserve its neutral position with regard to industrial relations. Furthermore, the Swedish model of collective bargaining was considered effective in the combat against foreign low-wage competition[208]. However, the striking weakness of the Swedish system in the light of the PWD is that posted workers and their employers cannot obtain advance information about the applicable minimum wages and other conditions laid down in collective agreements. It is problematic since one of the most important aims of the PWD was to make sure that such information is available for foreign undertakings[209]. From their point of view, the Swedish model is therefore impeding the free movement of services in the EU.

Some explanation is also needed to clarify the second question for a preliminary ruling concerning the so-called 'Lex Britannia'. The Swedish Law on workers' participation in decisions (Medbestämmandelagen, 'MBL') contains the rules applicable to the industrial relations, including the obligation of social peace between employers and workers that are bound by a collective agreement. If an agreement exists, it is prohibited to take collective action with the aim of obtaining amendments to the agreement. The Swedish Labour Court's second question concerned a specific provision of the MBL. The provision was added to the Statute after the Labour Court's judgment in 1989 (the so-called 'Britannia'

[206] Liukkunen 2006, p. 206, 219.
[207] Malmberg and Sigeman 2008, p. 1117.
[208] Malmberg and Sigeman 2008, p. 1122.
[209] Liukkunen 2006, p. 220.

judgment), in which it held that the mandatory social truce extends to collective action taken in order to set aside or amend a collective agreement concluded between foreign parties if such collective action is prohibited by the foreign legislation applicable to the signatories to that agreement. As a result of that judgment, the Swedish legislator decided to reduce its scope by introducing the 'Lex Britannia', which entered into force in July 1991. A new provision was added to the MBL, according to which the obligation of social peace shall apply only if an association takes collective action by reason of terms and conditions of employment falling directly within the scope of the MBL. As a result, collective action against a foreign employer carrying out temporary activities in Sweden was no longer prohibited provided that the link with Sweden is too tenuous for the MBL to apply directly to the terms and conditions of employment in question.[210]

4.4.2 The Need to Negotiate and More Favourable Conditions of Employment

Owing to the fundamental nature and complexity of the issues put forward in *Laval*, the lengthy judgment was handed down by the Grand Chamber of the Court. Not surprisingly, the Court did not have much difficulty with the referring court's second question that concerned the disputed 'Lex Britannia'. It considered the Swedish law directly discriminatory since it failed to take into account collective agreements that foreign employers were already bound to in the Member State of establishment, irrespective of the content of those agreements. 'Lex Britannia' was thus easily rejected. The rest of the case is, however, much more complicated, as the following short presentation will demonstrate.

In order to give a ruling on the actual issue of the case, the Court started by slightly reformulating the first question of the Swedish Labour Court. Firstly, the Court stated that the case concerns a Member State in which the matters listed in the PWD, save for minimum rates of pay, are contained in legislative provisions. Secondly, the referring court was asking whether Articles 12 and 49 EC and the PWD preclude a collective action that is aimed at forcing a guest service provider to enter into negotiations on the rates of pay of posted workers. Thirdly, the collective action was also aimed at concluding a collective

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[210] Case C-341/05, *Laval* [2007] ECR I-11767, para. 11–16.

agreement, the terms of which lay down more favourable conditions than those resulting from the legislation and matters other than those listed in Article 3(1) of the PWD.[211]

First of all, the Court ascertained that it is Article 49 EC that lays down the specific prohibition of discrimination so far as the freedom to provide services is concerned. It was therefore unnecessary to rule on Article 12 EC. The Court proceeded by stating that according to well-established case law a service provider cannot be prohibited from providing its services in another Member State and moving there freely with all its staff. Conversely, the Member States are not precluded from applying their legislation or collective agreements relating to minimum wages to any person who is employed, even temporarily, within their territory. Faithful to its earlier case law, the Court held that the application of such rules is, however, subject to the demands of proportionality. Having established the already classical state of affairs, the Court moved on to examine the PWD in the light of its Preamble. The Court noted that the Directive had not harmonised the content of the mandatory rules of employment laid down in Article 3(1); the content remained to be freely defined by the Member States in compliance with the Treaty and the general principles of Community law. The Court's conclusion at this point was that the first question had to be examined with regard to the provisions of the PWD interpreted in the light of Article 49 EC. Furthermore, where appropriate, the question had to be interpreted with regard to Article 49 EC itself.[212]

After the preliminary considerations, the Court continued by examining the possibilities that were available to the Member States for determining the terms and conditions of employment applicable to posted workers. The Court pointed out the possibility provided for by the second paragraph of Article 3(8) of the PWD to those Member States that do not have a system for declaring collective agreements to be of universal application. According to the Court, the recourse to that possibility explicitly requires that 'the Member State must so decide'.[213] Since the purpose of the PWD, however, is not to harmonise the national systems for establishing terms and conditions of employment, the Court held that Member States are free to choose a system at the national level which is not expressly mentioned in

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[211] Case C-341/05, *Laval* [2007] ECR I-11767, para. 53.
[212] Ibid., para. 54–61.
[213] Ibid., para. 65–66. Hence, the Court confirmed that Article 3(8) imposes an obligation to make a decision of some kind. As noted before, the Finnish language version of the PWD does not contain any reference to the need to make a decision. See Section 3.2.3 of Chapter 3 above.

the Directive[214]. Therefore, the Court did not condemn the Swedish system as such, but instead declared that Sweden could not impose an obligation to negotiate on wages with regard to guest service providers since the state did not have minimum rates of pay that would be determined in accordance with the PWD.[215]

As a next step, the Court proceeded to consider the terms of the collective agreement that were more favourable than the terms provided for in the Swedish legislation. The Court held that the purpose of Articles 3(1) and 3(7) of the PWD is to enable posted workers to enjoy the better terms and conditions of employment in the host state in case the level of protection is lower in their home state. Limiting the meaning of Article 3(7) to a comparison of terms and conditions between the host and home state, the Court refused to interpret the Article as allowing Member States to extend the Directive's list of mandatory rules. Giving one of its most important statements in *Laval*, the Court held that Article 3(1) expressly lays down 'the degree of protection' for undertakings posting workers to other Member States to observe. If Member States were given open hands to extend the nucleus of mandatory rules to apply, 'such an interpretation would amount to depriving the directive of its effectiveness'.[216] By a reference to the Directive's *effet utile* as interpreted by the Court, it was established that the level of protection guaranteed to posted workers is limited to that provided for in Article 3(1) of the PWD. Although the first indent of Article 3(10) gives Member States the possibility to apply further terms and conditions of employment in the case of public policy provisions, in the case at hand the additional obligations were included in a collective agreement without the national authorities' having had recourse to Article 3(10). Moreover, since trade unions themselves are not bodies governed by public law, they could not base their demands on that provision.[217] The PWD that many had considered to be a minimum directive was thus established to be a maximum directive instead[218].

[214] Ibid., para. 68. The Court added that the national system, however, must not hinder the provision of services between the Member States.
[215] Ibid., para. 69–71.
[216] Ibid., para. 73–81.
[217] Ibid., para. 82–84.
[218] See, e.g., Bruun 2006, p. 25 and Eklund 2008, p. 566.

4.4.3 Right to Take Collective Action and Direct Horizontal Effect of Article 49

Having interpreted the situation in the light of the provisions of the PWD, the Court considered it necessary to assess the collective action also from the viewpoint of Article 49 EC. What followed was an illuminating examination of the right to take collective action and its status as a fundamental right. The Court's clear stand on the issue was particularly welcome considering that *Laval* was the first case where the Court has ruled on the acceptability of a trade union strike in a Member State[219]. Many arguments have been presented to support the view that the fundamental right to take collective action should be granted precedence over the rules on the fundamental freedoms of movement contained in the Treaty and secondary law[220]. First of all, the PWD itself declares that it is without prejudice to the Member States' law concerning collective action[221]. In the Treaty a significant statement is included in Article 137(5) EC, according to which the article's provisions do not apply to pay, the right of association, the right to strike or the right to impose lock-outs. Secondly, it is possible to argue that since Article 136 EC makes a reference to the need to take into account the fundamental social rights it should be seen as prescribing a kind of recognised immunity for trade unions from liability caused by industrial action[222]. A further argument to put forward is the fact that the right to take collective action enjoys constitutional protection in most Member States. The right is also protected in various international instruments, none of which, one may argue, speak in favour of the application of a specific economic defence of an employer sending its employees to work in another state[223].

In its ruling the Court made clear that none of the presented arguments grant trade unions immunity with regard to the need to reconcile their fundamental right with the fundamental freedoms of movement. The Court started by stating that when exercising their competence in the areas that are outside the competence of the Community, the Member States must

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[219] In *Viking* that was handed out just a few days before *Laval* the Court dealt with a collective action taken by the Finnish Seamen's Union against an undertaking aiming to register its vessel under the flag of another Member State. In that ruling the Court, however, left the collective action's proportionality for the national court to determine, whereas no such margin of appreciation was left in *Laval*. See Case C-438/05, *Viking* [2007] ECR I-10779, para. 87.
[220] Case C-341/05, *Laval* [2007] ECR I-11767, para. 86. On the different views in legal literature see Hellsten 2007, the second article, p. 79–83.
[221] Recital 22 of the Preamble to the Directive.
[222] Sigeman & Inston 2006, p. 371. Article 136 EC refers to the European Social Charter and the Community Charter of Fundamental Social Rights of Workers. Both of them include the right to strike.
[223] Eklund 2008, p. 567.

nevertheless comply with Community law when laying down the conditions for the exercise of the rights at issue. Therefore, even though Article 137 EC does not apply to the right to take collective action, it does not mean that collective action as such is excluded from the domain of Articles 43 and 49 EC. The Court continued by establishing that although the right to take collective action indeed is a fundamental right forming an integral part of the general principles of Community law, the exercise of that right may none the less be subject to certain restrictions. By referring to its rulings in *Schmidberger*[224] and *Omega*[225], the Court held that the trade unions' right to take collective action must be reconciled with the other rights protected under the Treaty, in accordance with the principle of proportionality.[226]

Since the Court had established that the right to take collective action could be reconciled with the freedom to provide services, it was still necessary to determine whether Article 49 EC was directly applicable against trade unions. Community law is relatively clear when it comes to the Member States' obligation to abstain from creating restrictions to the free movement of services. The ECJ has on several occasions affirmed that Article 49 has a direct effect, which means that individuals may rely on it directly against the state authorities[227]. However, before *Laval* and the other recent case concerning collective action, *Viking*[228], it was not evident whether Article 49 EC, and Article 43 EC with regard to *Viking*, could be directly effective against such private actors as trade unions. The question was to what extent trade unions have the right to restrict the freedom to provide services by taking industrial action against a guest service provider.[229] After the Court's recent rulings the situation has become clearer: it is now indisputable that trade union actions are capable of attracting the direct application of Article 49 EC. The Court referred to its earlier case law in which it had already held that if private parties are capable of creating obstacles to the fee movement of services, they may be bound by Article 49 EC[230].

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[224] Case C-112/00, *Schmidberger* [2003] ECR I-5659, para. 74. The case concerned a public demonstration on a motor way restricting the free movement of goods between two Member States. The *Laval* case has to be distinguished from *Schmidberger* since in the latter the Court examined only the aim that was pursued by the national authorities when they authorised the demonstrators' assembly. The specific aims of the participants in the demonstration were not, as such, decisive in the Court's reasoning. See para. 66–68.
[225] Case C-36/02, *Omega* [2004] ECR I-9609, para. 35 (on the respect for human dignity).
[226] Case C-341/05, *Laval* [2007] ECR I-11767, para. 87–95 and case C-438/05, *Viking* [2007] ECR I-10779, para. 40–47.
[227] See the first case 33-74, *van Binsbergen* [1974] ECR 1299.
[228] Case C-438/05, *Viking* [2007] ECR I-10779.
[229] Sigeman and Inston 2006, p. 366.
[230] See Chapter 2, Section 2.2.2 above.

In *Walrave*[231] the Court had noted that those Member States who leave some aspects of their socio-economic life like working conditions for private groups to manage should not be placed in a more favourable position compared to those states that regulate the issues themselves. Considering this statement one could argue that the Court's position on Swedish trade unions as being able to attract the application of Article 49 EC was not so surprising after all. However, a somewhat plausible argument has been that collective agreements, and accordingly collective action, should be left entirely outside the scope of fundamental freedoms of movement by analogy to the case Albany[232] in the field of competition[233]. In Albany the Court held that collective agreements must by virtue of their inherent restrictions of competition be regarded as falling outside the scope of Article 81 EC on anti-competitive agreements and concerted practices, as otherwise the social policy objectives of such agreements would be seriously undermined[234]. This would be the case if management and labour were subject to Article 81(1) EC when jointly adopting measures to improve working conditions. The *Albany* argument was not considered in *Laval*, but in *Viking* the Court held that the *Albany* reasoning could not be applied in the context of the fundamental freedoms of movement since no restrictions on those freedoms may be considered to be inherent in the exercise of trade union rights and the right to take collective action[235].

One should, however, point out that the PWD itself does not have a direct horizontal effect on trade unions. The prevailing legal position is that directives, in general, are not capable of being directly applicable between private parties[236]. Nevertheless, in *Laval* the Court's conclusion was that Community law precluded the collective action taken by the Swedish trade unions since the aims pursued by the action were not in accordance with the PWD and constituted a restriction to the Latvian undertaking's freedom to provide services. The restrictive effect was due to the fact that the collective agreement, the signing of which was the aim of the action, contained terms relating to obligations that were more favourable than legislative provisions or matters not referred to in the PWD. According to the Court, the obstacle to the free movement of services could not be justified by objectives in the

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[231] Case 36-74, *Walrave* [1974] ECR 1405, para. 19.
[232] Case C-67/96, *Albany* [1999] ECR-5751.
[233] See Bercusson 2007, p. 284.
[234] Case C-67/96, *Albany* [1999] ECR-5751, para. 59–60.
[235] Case C-438/05, *Viking* [2007] ECR I-10779, para. 48–55.
[236] Prechal 2005, p. 255–258. See also Malmberg and Sigeman 2008, p. 1134.

general interest such as the protection of workers since the PWD expressly lays down the level of protection foreign service providers are supposed to observe. [237] With regard to the determination of rates of pay, a restriction emerged from the fact that in order to ascertain the applicable wages posting undertakings could be forced into negotiations of unspecified duration. No justification was available with regard to the negotiations on pay either since those negotiations were part of a national context that was characterised by a lack of sufficiently precise and accessible provisions that would not render it impossible or excessively difficult for service providers to determine their obligations as regards minimum pay.[238] Consequently, the Court's final conclusion was that Article 49 EC and Article 3(1) of the PWD *are to be interpreted* as precluding the collective action taken by the Swedish trade unions.

4.5 *Rüffert*: Confirming *Laval*

Only a few months after ruling on the collective action in Sweden, the Court had an occasion to show that that the judgment in *Laval* was not an extraordinary exception but more like the beginning for a consistent line of case law on the way the PWD should be interpreted. In *Rüffert*[239] the Court did not have to go as far as condemning a collective action, instead it had to turn down the Law of Land Niedersachsen (Germany) on the award of public contracts. The aim of the Law was clear: by requiring public authorities to designate public works only to such undertakings that have agreed to pay their employees the minimum wages prescribed by the local collective agreement, the Law counteracted distortions of competition resulting from the use of cheap labour. When signing public works contracts with contracting authorities, undertakings were committed to apply the local collective agreement and to pay a contractual penalty in case of non-fulfilment of their obligations. Where a contractor failed to do so, the contracting authority could terminate the contract without notice and exclude the undertaking from the award of further public contract for a period of up to one year. The same obligations of the contractor applied also in the event that there was a non-fulfilment of obligations on the

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[237] C-341/05, *Laval* [2007] ECR I-11767, para. 99–108.
[238] Ibid., para. 100, 109–110. The Court had held already in *Arblade* that the application of collective agreements to posting undertakings required that the provisions of the agreements were sufficiently precise and accessible and they did not render it impossible or excessively difficult in practice for the employer to determine his obligations in the host state. Joined cases C-369/96 and C-376/96, *Arblade and others* [1999] ECR I-8453, para. 43.
[239] Case C-346/06, *Rüffert* [2008], the judgment of 3 April 2008, not yet published in the ECR.

part of its subcontractor. As for the facts of the case, they were the following: in autumn 2003 a public works contract was awarded to a German construction company that used as a subcontractor an undertaking established in Poland. In summer 2004, having found out that the subcontractors' workers were paid significantly less than what was provided for by the applicable collective agreement, Land Niedersachsen terminated the contract. Furthermore, a penalty notice was issued against the person primarily responsible at the Polish undertaking. The case went to court. The appeal court, Higher Regional Court of Celle, considered that the resolution of the dispute was dependant on the local legislation's compatibility with Community law, in particular, with the freedom to provide services. It decided to stay the proceedings and turned to the ECJ for a preliminary ruling.[240]

Although the referring court was concerned about the Polish undertaking losing its competitive advantage enjoyed due to its lower wage costs, this was not what the ECJ focused on. Neither was the object of interest the Law of Land Niedersachsen on public contracts, but instead the German Law on posting of employees ('AentG'). According to the Court, the central question was whether the rate of pay laid down in the Law of Land Niedersachsen was fixed in accordance with one of the procedures laid down in Article 3(8) of the PWD. The relevant legislative instrument was the AentG, which extends the application of minimum wages of collective agreements that have been declared universally applicable to employers posting their workers to Germany.[241] In answer to a written question from the Court, Land Niedersachsen had confirmed that the collective agreement applied to the Polish undertaking was not a collective agreement that had been declared universally applicable within the meaning of the AEntG. On that basis, the Court could draw the following conclusion: if a Member State has a system for declaring collective agreements to be universally applicable, it cannot require posting undertakings to apply other types of agreements. According to the Court, it is clear from the actual wording of Article 3(8) of the PWD that the other systems for the application of collective agreements are available only if a Member State does not have a system of universal application, which is not the case in Germany.[242]

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[240] Ibid., para. 5–16.
[241] Ibid., para. 23–25.
[242] Ibid., para. 26–31.

When it came to the interpretation of Article 3(7) of the PWD concerning terms and conditions of employment which are more favourable to workers, the Court could simply repeat its reasoning in *Laval*[243]: the PWD expressly lays down the degree of protection that a Member State is entitled to require posting undertakings to observe since another interpretation would amount to depriving the directive of its effectiveness[244]. The Court then drew the only possible conclusion there was left to make: on the basis of the PWD a Member State is not entitled to impose on foreign service providers a rate of pay that does not constitute a minimum wage within the meaning of Article 3(1)(c) of the PWD[245]. The conclusion was based on exactly the same interpretation of the PWD that the Court had already reached in *Laval*. There is, however, a significant difference between the two cases. In *Laval* the problem was the way the rates of pay were settled, not the lack of universal declaration of collective agreements[246]. In *Rüffert* the minimum wages were clearly stated in the collective agreement – the problem was that the agreement was not universally applicable. The distinguishing factor is that since Germany has a system of universal application, posting undertakings could not be required to apply whatever local agreements there were available.

Having established the non-conformance with the PWD, the Court shortly examined the situation with regard to Article 49 EC. In *Laval* the Court had also considered it necessary to examine the collective action not only under the PWD, but also in the light of Article 49 EC[247]. That examination in *Laval*, however, did not go very far since the Court found out that as a result of the coordination achieved by the PWD, employers could not be required to observe obligations outside the mandatory rules laid down in that Directive[248]. In *Rüffert* the Court did not explicitly state that the situation should be interpreted in the light of Article 49 EC. It did, however, consider its restrictive effect on the freedom to provide services and concluded that the application of the local minimum rate of pay could not be justified on the basis of worker protection. Since the rate of pay was obligatorily applied only to those undertakings that had concluded a public contract, the Court did not see any reason why the protection resulting from such a rate of pay was necessary for a

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[243] C-341/05, *Laval* [2007] ECR I-11767, para. 80.
[244] Case C-346/06, *Rüffert* [2008], the judgment of 3 April 2008, not yet published in the ECR, para. 33.
[245] Ibid., para. 35.
[246] In *Laval* the Court had explicitly stated that Member States are free to choose a system at the national level that is not mentioned in the PWD. See C-341/05, *Laval* [2007] ECR I-11767, para. 68.
[247] See C-341/05, *Laval* [2007] ECR I-11767, para. 85.
[248] Ibid., para. 108.

construction worker only when he is employed in the context of a public contract. Moreover, the sought wage exceeded the minimum rate of pay that was provided for by the universally applicable collective agreement of the German construction sector. The Court wound up the reasoning by stating that the PWD, interpreted in the light of Article 49 EC, precludes a legislative measure as such that was adopted in Land Niedersachsen.

There is an interesting difference in the formulation of the judgments in *Laval* and *Rüffert*. In the first case the Court established that Article 49 EC and the PWD together were to be interpreted as precluding the collective action taken by the trade unions. In *Rüffert* the Court concluded that it is the PWD, *interpreted in the light of Article 49 EC*, which precludes the legislative measure that was taken in Germany. The difference in the formulations of *Laval* and *Rüffert* is probably not of great significance[249]. The most important feature of both judgments remains the same: the PWD expressly lays down the degree of worker protection that is considered necessary. No other interpretation is possible since the Directive 'seeks in particular to bring about the freedom to provide services'[250].

4.6 Some Reflections on the Recent Rulings

Is the PWD a minimum or a maximum directive? That seems to be the most important – and controversial – question raised by the Court's rulings in *Laval*[251] and *Rüffert*[252]. By deciding for the maximum, the Court is first and foremost interpreting the PWD in the light of its legal basis that is in the freedom to provide services. Some are arguing that the Court's underlying thinking is based on a conception that visiting companies should not be entirely prevented from using their comparative advantage resulting from the differences in

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[249] Since *Laval* concerned private action, the Court probably considered it necessary to examine it more thoroughly under Article 49 EC. *Rüffert*, on the other hand, concerned a legislative measure of public authorities. Such a measure should, of course, respect Community legislation, including the PWD.
[250] The cited statement was given by the Court in *Rüffert*, para. 36.
[251] Case C-341/05, *Laval* [2007] ECR I-11767.
[252] Case C-346/06, *Rüffert* [2008], the judgment of 3 April 2008, not yet published in the ECR. See also the very latest judgment on posted workers in case C-319/06, *Commission v Luxemburg III* [2008], the judgment of 19 June 2008, not yet published in the ECR. In that case the Court continues on the path chosen in *Laval* and *Rüffert*. See especially para. 26, in which it is said that Article 3(1) of the PWD sets out 'an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State'. Article 3(10) on public policy provisions was to be interpreted strictly and it could thus not be easily used as a means of extending the mandatory rules applicable to foreign service providers.

the terms and conditions of employment between the host and the home state[253]. Moreover, they should be well capable of knowing in advance all the contractual standards that will be binding upon them[254]. On the basis of *Laval* one could thus conclude, probably somewhat critically, that the directive is more instrumental for the integration of the services market than for the protection of workers employed in that market[255]. On the other hand, one can also claim that the protection of workers is sufficiently safeguarded since their rights are extensively prescribed by the PWD, the aim of which is also the prevention of social dumping. From that point of view the problem is in the weaknesses of national collective bargaining systems that do not always take into account the exigencies of Community law and the modern internal market.

Although in both *Laval* and *Rüffert* the Court seems very confident in the way it sees the purpose of the PWD, other interpretations are also possible. A striking feature of both *Laval* and *Rüffert* is that in their opinions Advocate Generals *Mengozzi* and *Bot* accordingly reached very different conclusions than the Court. Advocate General *Mengozzi* was willing to accept the collective action taken by the Swedish trade unions on the condition that it was motivated by public interest objectives and not carried out in a manner that is disproportionate to the attainment of those objectives. Although sceptical towards some of the pecuniary obligations imposed by the concerned collective agreement, he left the proportionality of the collective action for the national court to determine.[256] Most notably, his attitude towards the Swedish model of collective bargaining was much more permissive than the Court's. According to *Mengozzi*, the uncertainties caused by the need to negotiate on the terms of employment are inherent in a system that is based on contractual freedom between social partners. He considered that, at its present stage of development, Community law should not intervene with that approach to employment relationships through the application of the fundamental freedoms of movement.[257]

Also in the *Rüffert* case the Advocate General's opinion was quite the opposite of the conclusions reached by the Court. Like *Mengozzi*, Advocate General *Bot* left it for the

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[253] Malmberg and Sigeman 2008, p. 1137.
[254] Orlandini 2008, p. 584.
[255] Ibid., p. 582.
[256] Case C-341/05, *Laval* [2007] ECR I-11767, opinion of Advocate General Mengozzi, delivered on 23 May 2007, para. 263, 298, 304.
[257] Para. 259–260.

court of reference to verify whether the national legislation conferred a genuine benefit on posted workers that significantly augments their social protection. Furthermore, the German court was to confirm that the principle of transparency of the conditions for the performance of public contracts was respected.[258] Most interestingly, Advocate General *Bot* considered that by referring to terms and conditions that are more favourable to workers, Article 3(7) of the PWD permits the host Member State to improve, for the matters listed in Article 3(1), the level of social protection it wishes to guarantee to posted workers. Hence, in his opinion, Article 3(7) of the PWD authorises the implementation of enhanced national protection on the basis of which undertakings could be required to apply rates of pay that were over the minimum of a collective agreement that was declared universally applicable.[259] Although in the Court's eyes the way the PWD is to be interpreted is so clear that another interpretation would deprive the Directive of its effectiveness, the two Advocate Generals reach a conclusion that is entirely opposite: according to them the PWD authorises an 'enhanced national protection'[260].

Compared to the conclusions reached by the Advocate Generals, the Court's rulings in *Laval* and *Rüffert* are based on a much more literal interpretation of the PWD. Considering the wording of the Directive, read together with its Preamble, there is actually nothing dubious in the logics of the Court's reasoning. The critical question, however, is whether the Court should have departed from the supposedly misleading wording, and legal basis, of the Directive in favour of a more socially oriented approach. That polemic shall be returned to in Chapter 7, in which the Court's 'law-making' role is discussed in light of its case law on posted workers. Before that it is however necessary, or at least very enlightening, to examine that case law from another point of view, namely that of immigration law.

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[258] Case C-346/06, *Rüffert* [2008], the judgment of 3 April 2008, not yet published in the ECR, opinion of Advocate General Bot, delivered on 20 September 2006, para. 117, 135.
[259] Ibid., para. 94–98.
[260] This is not the term Advocate General *Mengozzi* is using in his opinion but on the basis of his argumentation it is clear that he interprets the PWD in a way very similar to Advocate General *Bot*. See, especially, para. 147 and 151 of his opinion in case C-341/05, *Laval* [2007] ECR I-11767, opinion of Advocate General Mengozzi, delivered on 23 May 2007.

”Nous ne coalisons pas des États,
nous unissons des hommes”
(Jean Monnet, Mémoires)

5 The Legal Status of Third-Country Nationals within the European Union

5.1 The Different Categories of Nationals in the European Union

The EU is not only a union of 27 Member States; it is also a union of its citizens. The Maastricht Treaty marked a new stage in the process of creating an ever-closer union among the peoples of Europe[261]. With the birth of the Union in 1992, a new kind of citizenship was established to complement the national citizenship[262]. Since then this development has greatly influenced the everyday life of EU citizens by conferring them rights that do not rely on the economic nature of their activities. Based on some major judgments given by the ECJ, the free movement of persons has now been extended to encompass all categories of citizens[263]. The Court has recalled on several occasions that the right to reside in the territory of any Member State is conferred directly on every citizen of the Union by Article 18(1) of the EC Treaty and that citizenship of the Union is destined to be a fundamental status of all nationals of Member States[264]. This enables EU citizens to enjoy the same kind of treatment in law irrespective of their nationality.[265]

Despite the exceptional construction of a common citizenship for all nationals of its Member States, so far the EU has not been capable of developing comprehensive common rules for nationals of other states residing in its territory[266]. National immigration laws of the Member State of residence still mainly determine the legal status of the so-called third-country nationals. ‘A third-country national’ (‘TCN’) is a well-established concept that describes individuals of other nationalities than those of the Member States of the EU[267]. According to the Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, a ‘third-country national means any person who is

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[261] Art. 1 EU.
[262] See Art. 17–22 EC on the Citizenship of the Union.
[263] See, e.g., cases C-85/96, *Martínez Sala* [1998] ECR I-2691 and C-184/99, *Grzelczyk* [2001] ECR I-6193.
[264] Case C-184/99, *Grzelczyk* [2001] ECR I-6193, para. 31.
[265] Craig and de Búrca 2008, p. 847–849.
[266] Staples 1999, p. 6.
[267] The nationals of Norway, Iceland, Liechtenstein and Switzerland are usually associated with EU citizens instead of TCNs based on extensive bilateral agreements between the EU and those states. See below 5.2.2.

not a citizen of the Union within the meaning of Article 17(1) of the Treaty'[268]. Although migration from outside and within is nothing new in Europe, the EC Treaty and the Treaty on European Union contain only a few provisions regarding the legal status of non-EU nationals. Migration remains extremely disputed due to fears connected to the possible damage a significant migration flow may cause to the national economy, social harmony and established cultural values.[269] National interests of Member States still largely determine their priorities. This is reflected in Member States' different approaches to solving migration issues, often depending on special relations they might have with third countries[270]. Notwithstanding the slow progress made in the field of EU-wide immigration law, some significant steps have been taken since the adoption of the Amsterdam Treaty in 1997. The EU has finally confronted the need to manage migration through harmonisation and started the creation of a common Asylum and Immigration policy[271]. Some important provisions establishing rights for TCNs can also be found in international legal instruments. The most important instruments in this sense are the Association Agreements concluded with third countries and the Council of Europe's European Convention on Human Rights[272].

5.2 TCNs as Independent Workers

5.2.1 The Meaning of an 'Independent Worker'

In this chapter I shall present an overview of the legal status of TCN-workers in the EU. In this respect, I differentiate between two categories: independent and posted workers. The purpose of the examination of the first category of workers is to demonstrate their position in relation to TCNs who are posted to work in another Member State. In order to assess the legal magnitude of the Court's case law concerning TCNs within the free movement of services, it is important first to clarify the legal status of TCNs as independent workers. In other words, contrary to posted workers, I am now referring to such workers who are not depending on their employer when moving inside the Union. I have chosen to call them

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[268] Council Directive 2003/109/EC, OJ L 16, 23.1.2004, p. 44–53, Art. 2.
[269] Peers 2006, p. 182.
[270] Staples 1999, p. 38.
[271] See the 'Tampere Milestone No 3' in the Council's Presidency Conclusions, 15–16 October 1999, Tampere. Available at: <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm>.
[272] Staples 1999, p. 3.

'independent workers' in order to distinguish them from those who are seconded to work in another state by their employer. One should not however confuse independent workers with the self-employed; I am only referring to those persons who decide to move to another Member State to work for an employer established in that state or who move to another Member State to seek employment there. Thus, with independent workers I refer to persons who would be within the scope of Article 39 EC, instead of Article 49 EC, if they were EU citizens. Since TCNs are not granted the right of free movement in the EU, their capacity to change workplace from one Member State to another is subject to the discretion of the Member States.

5.2.2 Association Agreements and other International Instruments

Before examining Community law measures, it is worth noting that TCNs residing in EU may derive some rights based on certain international instruments. An important role is played by Association Agreements that are acts of public international law establishing rights and obligations between contracting parties[273]. The agreements may cover a vast number of issues, for instance free trade, free movement of persons in certain respects and the respect of democracy and human rights. The most far-reaching agreement of this kind is the European Economic Area (EEA) Agreement [274] with Norway, Iceland and Liechtenstein. The EEA Agreement essentially fully extends the Community's free movement legislation and relevant case law of the ECJ to nationals of these states[275]. The situation resulting from other Association Agreements with third countries is much more complex. This is due to the fact that the agreements are very different from one another and cannot be similarly interpreted. Moreover, Association Agreements are not necessarily interpreted the same way as the EC rules on free movement even if they have a similar or identical wording. So far the Court has ruled that the Association Agreements form an integral part of Community law[276] and that the provisions of those agreements are capable

[273] In Article 310 EC, the Community is given the competence to conclude with one or more states agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.
[274] Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 3–606.
[275] Most of the EC free movement rules also apply to Switzerland with the exception of some transitional periods and certain limitations on the right to provide services. See Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L 114, 30.4.2002, p. 6–72.
[276] See case 181-73, *Haegeman* [1974] ECR 449, para. 5.

of having a direct effect where they are sufficiently clear, precise and unconditional[277]. Consequently, where the provisions of an Association Agreement provide for a higher protection than provisions on a national level, the former prevails[278]. The Court has confirmed that it can interpret also those provisions of Association Agreements that relate to immigration[279].[280]

Apart from the EEA and Switzerland Agreements, the early EC-Turkey Association Agreement[281] is the most significant instrument of Community's external relations in terms of securing rights for TCN residents. The Agreement has later been supplemented by several protocols and decisions of the EC-Turkey Association Council. The Agreement sets out the goal of free movement of workers, services and self-employed persons[282]. The key provisions for individual workers are found in the Association Council's Decision No 1/80[283], which provides for a renewed work permit after one year's legal employment provided the original job is still available. After three years' employment the worker is then entitled to respond to another job offer in the same occupation subject to priority of EU nationals. After four years of legal employment the Turkish national has free access to any paid employment. Although the EC-Turkey Agreement is of significant importance for those Turkish workers who have managed to enter the labour market in a Member State, it does not grant any right of free movement between Member States[284]. Moreover, the Court has made clear that the Agreement does not affect the control of national authorities over initial entry and employment of Turkish workers and family members[285].[286] In general, the case law on Association Agreements is quite fragmented and the Court has rarely found

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[277] See case 12/86, *Demirel* [1987] ECR 3719, para. 14.
[278] Staples 1999, p. 3–4.
[279] Ibid., para. 9.
[280] Peers 2006, p. 202–203.
[281] Agreement establishing an Association between the European Economic Community and Turkey, OJ 217, 29.12.1964, p. 3687–3688. English Edition of the Agreement in OJ L 361, 31.12.1977, p. 60.
[282] The Court has however ruled that the Agreement's provisions on free movement only set out a programme and are not sufficiently precise and unconditional to confer directly effective rights that could be invoked by Turkish workers in national courts. See case 12/86, *Demirel* [1987] ECR 3719, para 23.
[283] Decision No 1/80 of the EC-Turkey Association Council of 19 September 1980, not published in the Official Journal.
[284] Case C-171/95, *Tetik* [1997] ECR I-329, para. 29: 'In contrast to nationals of Member States, Turkish workers are, admittedly, not entitled to move freely within the Community but benefit only from certain rights in the host Member State whose territory they have lawfully entered and where they have been in legal employment for a specified period'.
[285] Ibid., para. 21.
[286] Peers 2006, p. 203–204.

them breached. This is understandable considering the limited scope of rights Association Agreements granted to TCNs.

In addition to international agreements concluded between the Community and third states, the EU Member States are also bound to many other international treaties, in particular to human rights treaties. The most important human rights convention for TCNs resident in a Member State is the European Convention on Human Rights[287]. Although the EU is not formally bound by the Convention, the ECJ has granted it a high standing in the Community legal order. Protocol no. 7 of the Convention compels parties to conform to certain procedural safeguards before expelling non-nationals from their territory. On a more general level, the Convention does not include any provisions concerning admission, expulsion or extradition of TCNs, nor does it facilitate any kind of human right to residence or to change of residence between different states.[288] The European Court of Human Rights has repeatedly held that as a matter of well-established international law states have the right to control the entry and residence of non-nationals on their territory[289]. Since the contracting parties to the Convention are however subject to the specific obligations arising from that treaty, some of their measures may amount to a breach of the Convention. TCNs that have been subject to expulsion by a Member State have occasionally been able to attract the application of Article 3 on prohibition of torture or Article 8 on right to respect for private and family law. These articles form the most significant exceptions to the main rule of state discretion when it comes to the expulsion of non-nationals.

5.2.3 Schengen *Acquis*

Article 14 EC sets out the goal of an internal market that shall comprise an area without internal frontiers in which the movement of goods, persons, services and capital is ensured

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[287] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, adopted in Rome on 4 November 1950, Council of Europe. Although the EU is not formally bound by the Convention, the ECJ has granted it a high standing in the Community legal order. See, e.g., case 4/73, *Nold* [1974] ECR 491, para. 13 and case 36/75 *Rutili* [1975] ECR 1219, para. 32.
[288] Pellonpää 2005, p. 461–462.
[289] See judgments of the ECHR: *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 8, § 14, Series A no. 94, para. 67 and *Boultif v. Switzerland*, no. 54273/00, § 8, ECHR 2001-IX, para. 46.

in accordance with the Treaty[290]. A European area without internal frontiers became a reality during the last decade when based on the 1990 Schengen Convention[291] most Member States abolished controls on persons at the internal borders of the Union. Five Member States anxious to go ahead with the abolition of internal border controls had established Schengen cooperation already in 1985. The Schengen Agreement of 1985 may therefore be seen as an example of flexible cooperation outside the Community legal order in a situation where no consensus could be reached at Community level. In 1997 the Treaty of Amsterdam incorporated the *Schengen* Convention and the decisions taken by the Schengen group members (the Schengen *acquis*) into the framework of the EC and EU Treaties[292]. The Schengen Convention provides for three categories of TCNs who can move freely within the Schengen area for a period of up to three months: TCNs holding uniform Schengen short-stay visas, those TCNs who are not subject to a visa requirement, and finally, TCNs who hold valid residence permits issued by one of the Schengen states[293].

While the abolition of internal border controls on persons has meant increasing freedom inside Europe for EU nationals and TCNs alike, the EU has been accused of creating a fortress that is becoming more and more difficult for outsiders to enter. For example, all Member States participating in the Schengen *acquis* now have a common list of those TCNs who must be in possession of visas when crossing the external borders of the EU[294]. Therefore, no special treatment in this respect is any longer granted to those TCNs who have close connections with one specific Member State. If a TCN is a *persona non grata* in one Member State, that state is able to prevent his access to the whole Schengen area[295]. Moreover, the external border controls on persons from third countries have become much

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[290] Article 14 EC [then Article 8a] was added by the Single European Act of 1986. In case *Wijsenbeek* the Court held that Article 14 EC did not have the automatic effect of abolishing internal border checks between Member States as such abolition could only result from the harmonisation of national laws on visas, external border checks, asylum, immigration and exchange of information. See case C-378/97, *Wijsenbeek* [1999] ECR I-6207, para. 40.

[291] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000, p. 19–62.

[292] Only the UK and Ireland opted out from the parts of the Schengen acquis regarding visa policy and border controls. The UK has however opted in to some measures under the Schengen Protocol on Title IV. Denmark still applies the Schengen *acquis* within the framework of international law. New Member States apply the *acquis* and gradually proceed to the abolition of internal borders. See Papagianni 2006, p. 30–32, 63, 71.

[293] Articles 19, 20 and 21 of the Convention implementing the Schengen Agreement. The Convention does not give TCNs any right to work in other Member States, it only provides for a stay up to three months.

[294] Council Regulation (EC) No 539/2001 of 15 March 2001, OJ L 81, 21.3.2001, p. 1–7.

[295] The Schengen Information System (SIS) allows the possibility for all participating states to set alerts on those persons who they consider to be a threat to public policy, national security or international relations.

stricter in order to compensate the free circulation while inside the Union. Within Schengen, the core act of negative legal integration in the form of abolition of internal border controls has thus led to considerable positive legal integration in the strengthening of external borders[296].

5.2.4 Measures adopted within the Community Legal Order

The EU is still far from having a coherent body of law setting out rights for legally resident TCNs. The Community competence in the field of migration, in particular with regards to labour migration, has been a subject of constant dispute. Taking into account that the Treaty of Amsterdam incorporated immigration, asylum and civil law issues in Title IV of the EC Treaty, the necessary legal bases now exist for the adoption of measures concerning the economic migration of TCNs. Article 137 EC grants competence to the Community to adopt measures concerning 'the conditions of employment' of TCNs. Interpreted broadly, Article 137 EC governs all issues of access to employment of TCNs. But looked at from a narrower interpretation it only covers working conditions. Articles 63(3)(a) and 63(4) EC of Title IV are however nowadays capable of covering any remaining issues of access to employment.[297] The problem is thus not in the lack of EC's competence over labour migration but in the involuntariness of the Member States to proceed with that competence.

The ambitious programme on common asylum and immigration policy set out at the Tampere European Council in 1999 led to several propositions and some directives regarding TCNs' rights in the EU. The first proposals concerned the right to family reunification[298] and the status of TCNs who are long-term residents[299]. The latter Directive establishes a new, common status for those TCNs who have resided 'legally and continuously' for five years in the territory of a Member State[300]. In addition, several other conditions for the acquirement of long-term resident status are laid down[301]. Article 11 of the Directive grants long-term residents a right to equal treatment with the Member States' nationals with regard to employment, education and social benefits. The most innovative

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[296] Peers 2006, p. 93.
[297] Peers 2006, p. 187–188.
[298] Council Directive 2003/86/EC of 22 September 2003, OJ L 251, 3.10.2003, p. 12–18.
[299] Council Directive 2003/109/EC of 25 November 2003, OJ L 16, 23.1.2004, p. 44–53.
[300] Ibid., Article 4(1).
[301] These include, among others, stable and regular resources, health insurance and compliance with possible integration conditions. See Article 5 of the Directive.

part of the Directive is the third Chapter that lays down the conditions under which a long-term resident may reside in a Member State other than where he or she has required the long-term status. The Long-term Residents Directive is significant as it is the first piece of Community legislation that provides for change of residence from one Member State to another.[302] The residence in another Member State is subject to exercise of an economic activity, pursuit of studies or other purposes[303]. Certain additional requirements do apply, since Member States may still maintain existing national quota systems and go through a prior examination of the labour market before permitting the entry for employment purposes. Moreover, Article 21(2) of the Directive includes a considerable limitation to the right of access to employment in the second state. A new residence permit is also required when a long-term resident moves to another Member State. In the second state the long-term status may be acquired under the same conditions as in the first state. Finally, it is worth noting that the Directive does not concern those long-term residents who are sent to work in another Member State as posted workers. Such workers cannot acquire the long-term status in the new state even if the working period lasts for more than five years[304].

On the basis of the Tampere Programme, three more directives were proposed by the Commission. The first led to the adoption of a Directive on the conditions of admission of TCNs for the purposes of studies, pupil exchange, unremunerated training or voluntary service[305]. Not surprisingly, the second proposal regarding TCNs' admission for paid employment and self-employed activities failed. The Draft Directive[306] was meant to define common conditions, standards and procedures for TCNs' entry for employment so that the need of the market to recruit quickly and successfully could be answered[307]. Several different categories of work permits were proposed, for example for seasonal and transfrontier workers. The Draft Directive also provided for the renewal of work permits and equal treatment with EU nationals in a number of areas. Based on an economic test Member States could still estimate whether there was a shortage in the labour market that could not be filled by nationals or TCNs legally resident in the country. The change of residence from one state to another was not addressed in the proposal. However,

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[302] Papagianni 2006, p. 158–159, 164.
[303] Council Directive 2003/109/EC of 25 November 2003, OJ L 16, 23.1.2004, p. 44–53, Article 14(2).
[304] Article 14(5) of the Directive.
[305] Council Directive 2004/114/EC of 13 December 2004, OJ L 375, 23.12.2004, p. 12–18.
[306] COM (2001) 386 final.
[307] Papagianni 2006, p. 170.

considering the object of the Draft Directive, labour migration, a consensus amongst the Member States soon proved impossible to achieve. Since the very competence of the Community on the Directive's matter was strongly contested by the Member States, the discussions in Council were quickly frozen and the proposal had to be withdrawn[308]. The third Directive proposed by the Commission concerned the facilitation of the admission of researchers into the EU[309]. It was adopted by the Council on 12 October 2005.

In 2005 the Commission put forward a Policy Plan on legal migration based on the objectives of the Hague Programme and the Lisbon strategy[310]. The plan introduced actions and legislative initiations the Commission is intending to put forward between 2007 and 2009 in order to continue with the development of the EU's legal migration policy. In addition to a directive providing a general framework for the rights of all immigrant workers, the Commission is working on four more specific directives covering entry and residence conditions for highly-skilled workers, seasonal workers, intra-corporate transferees and remunerated trainees. So far, two proposals have already been issued. The Draft General Framework Directive defines the basic rights of all immigrant workers admitted in the EU[311]. It does not touch upon admission conditions, but introduces a single, simplified application procedure for a combined residence/work permit. The Commission acknowledges that the 'rights cap' regarding third-country workers contributing to the society should be fixed by granting them similar rights as national workers. Furthermore, also Member State nationals would benefit from a common set of rights since unfair competition based on exploitable labour would diminish[312].

The other proposal put forward by the Commission concerns highly-skilled workers[313]. According to the Commission, it aims at an effective response to growing demands for highly qualified immigrant labour by facilitating the admission procedure of this category of workers and their allocation and re-allocation on the EU labour market[314]. With this

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[308] Ibid. The proposal was based on Article 63(3)(a) EC. The procedure for the adoption of the Directive is provided for by Article 67 EC: a unanimous vote in the Council is still needed.
[309] Council Directive 2005/71/EC of 12 October 2005, OJ L 289, 3.11.2005, p. 15–22.
[310] COM (2005) 669 final.
[311] COM (2007) 638 final.
[312] Ibid., p. 3.
[313] COM (2007) 637 final.
[314] Ibid., p. 2. By highly qualified workers the Commission means persons who are in paid employment for which higher education qualifications or at least three years of equivalent professional experience is required. See Article 2(b) of the Draft Directive. In order to be admitted, the third country worker must have a work

proposal the Commission introduces the ambitious idea of an EU work permit, a so-called 'EU Blue Card', issued by one Member State but valid throughout the Union. The EU Blue Card would allow its holder to move for work in another Member State after two years of legal residence in the first state[315]. However, Member States' competence to determine the volumes of persons to be admitted remains unaffected, as do the rules regulating access to the national labour market[316].

A directive on labour migration within the EU is important to achieve since the development of a genuine common immigration policy is impossible without addressing this issue[317]. It will be interesting to see whether the 'EU Blue Card' will have any better success than the previous initiatives in this field. The Commission is rather convincing in its reassurances[318]. Supporting the proposal with the principle of subsidiarity, it argues that the objectives of efficient labour migration cannot be sufficiently achieved on separate national levels only. As long as each Member State has its own closed system of admittance, the Member States are only competing with one another[319]. While giving skilled third-country workers more attractive choices, the Member States would also gain benefit by re-allocating work force according to changes on labour markets.

5.3 Derived Rights

I shall now turn to the doctrine of the so-called 'derived rights'. The doctrine is based on the ECJ's innovative case law through which TCNs have come to enjoy some indirect rights of free movement within the EU. Derived rights of free movement have so far been granted to TCNs as employees of cross-border service providers, as well as to TCNs in their capacity as a family member of a EU citizen. The concept is based on the assumption that EU nationals might decide not to benefit from their free movement rights, if

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contract and a salary at least equal to a certain threshold set at the national level. See Article 5 of the Draft Directive.

[315] Article 19 of the Draft Directive. If the worker still fulfils the conditions for an EU Blue Card, the second Member State will allow the worker to reside on its territory for highly qualified employment.

[316] Articles 7 and 9 of the Draft Directive. Article 9(2) provides that Member States may examine the situation of their labour market and preference may be given to EU nationals and legally residing TCNs.

[317] Papagianni 2006, p. 170.

[318] See COM (2007) 637 final, p. 7.

[319] The Commission notes that at the moment the EU is losing to the USA and Canada that attract the vast majority of highly-skilled workers and specialists. The unattractiveness of the EU is greatly due to the fact that migrants must face 27 different admission systems and do not have the possibility to change work place easily from one country to another. See COM (2007) 637 final, p. 3.

Community law does not provide protection to a broader range of individuals than is covered by the EC Treaty. If such protection was not granted, a service provider might decide not to use their freedom under 49 EC, as they would have to obtain residence and work permits for their non-EU national employees. A Member State national, respectively, might abstain from using his or her freedom of movement if their closest family members could not accompany them.[320] In the cross-border provision of services the Court has established that posted workers may not be required to obtain work permits in the host Member State for the period of posting in that state[321]. With regard to family members of EU citizens who are non-EU nationals, the Court has significantly limited Member States' discretion to decide on their right of residence.

The Court's ruling in *Singh*[322] is a demonstrative example of a TCN's derived right based on his status as a family member of a Member State national. The case concerns Mr *Surinder Singh*, an Indian national who in 1982 married a British citizen in the United Kingdom. From 1983 until 1985, the couple was living and employed in Germany. Owing to her status as a Community worker, Mrs *Singh* had the right to be joined in Germany by her spouse. Under Community law, also at the time[323], the joining spouse's nationality is not restricted to Community nationals only. At the end of 1985, the British-Indian couple decided to return to the United Kingdom in order to open a business there. In proceedings concerning Mr *Singh*'s right to reside in the United Kingdom, a national court referred a question to the ECJ for a preliminary ruling. The question was whether a married Member State national who had exercised her right of free movement in another Member State was entitled to have her non-Community national spouse joining her when she returned to her state of origin[324]. The United Kingdom argued that only domestic law applied as the question concerned a situation where Mrs *Singh* returned to her home country. Additionally, the United Kingdom was of the opinion that the application of Community law to a national who returns to establish herself in her country of origin increases the risk of fraud associated with marriages of convenience. Community law could thus be used for

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[320] Staples 1999, p. 87–88.
[321] See, e.g., Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417 and case C-43/93, *Vander Elst* [1994] ECR I-3803.
[322] Case C-370/90, *Singh* [1992] ECR I-4265.
[323] The right was based on Art. 10 of Regulation No 1612/68 of the Council, OJ L 257, 19.10.1968, p. 2–12. Today the relevant piece of legislation is Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, OJ L 158, 30.4.2004, p. 77–123.
[324] Case C-370/90, *Singh* [1992] ECR I-4265, para. 9.

fraudulent purposes in situations where a TCN could not benefit from any right of residence on his own[325]. The Court did not accept the proposed arguments but stated that after having gone to work in another Member State, Mrs *Singh* had the right when establishing herself as a self-employed person in her home state to be accompanied by her spouse, even though he was not a national of any Member State. The spouse and children of a Community national should be permitted to enter and reside in the Community national's state of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State. If that were not the case, the Community national would be deterred from leaving her country of origin in order to pursue an economic activity in another Member State[326].

In the *Singh* case, Mr *Singh* was thus given the right to stay in the United Kingdom. His right, however, was strictly based on that of his wife. Similarly, in the cross-border provision of services the right that is being practiced is regarded as that of the provider of services instead of that of his workers. The provision of services shall now be examined with regard to posting of third-country workers. The following chapter will then demonstrate how the special status of TCNs within the free provision of services has developed through the Court's case law during the past 20 years. One has to bear in mind that the Court has not granted TCNs any independent right to work freely in different Member States. Nevertheless, even the derived right established by the Court has proved to be visionary in the Union where the Member States have so constantly failed to regulate the position of TCNs in legal employment.

5.4 TCNs as Posted Workers

As the present thesis in general, also this chapter deals only with the provision of services inside the EU, between two or more Member States. Therefore, a reference to 'foreign service providers' means only those providers of services who are established in an EU Member State. According to Article 48 EC, companies formed in accordance with the law of a Member State and having their registered office within the Community are treated in the same way as natural persons who are Member States' nationals. Hence, companies established in the EU may enjoy the same right to freedom to provide services under

[325] Ibid., para. 14.
[326] Ibid., para. 19–20.

Article 49 EC as natural persons who are nationals of Member States and established in a Member State. Despite certain attempts, the Council has not yet extended the Treaty's provisions on free movement of services to nationals of third countries who are established within the Community although this possibility is provided for in Article 49(2) EC.

In 1999, the Commission proposed two directives relating to TCNs in the cross-border provision of services. The draft directives introduced an "EC service provision card" which would have been issued by the Member State where the service provider is established. The aim was to provide common administrative requirements to be fulfilled by all service providers and ensure their compliance. One of the Commission's parallel proposals aimed at extending the freedom to provide cross-border services to third-country nationals established within the Community[327]. The other covered the right of providers of services to provide services in other Member States using non-Community workers who were lawfully employed in the Member State of origin[328]. The latter proposal's aim was to facilitate the posting of third-country workers since service providers wishing to post those workers were experiencing damaging delays and encountering such difficulties that they were often obliged to withdraw from providing the service at all[329]. By issuing an "EC service provision card" the Member State of origin would have declared that the situation of the posted worker is lawful and that he or she is affiliated to the social security scheme of that state. The card was to be a separate document belonging to the services provider and put at the disposal of the posted worker[330]. All Member States were to permit the entry and residence of a posted third-country worker if such person was in possession of the EC service card. No entry visas, residence or work permits could be required. However, if the provision of services were to last for more than six months out of a period of twelve months, the host state would issue a temporary residence permit showing that the residence is authorised[331].

The proposed Directive did not establish any new rules concerning the posted TCNs' right to work, since the Court had already several years before denied the possibility to require

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[327] COM (1999) 3 final, p. 17. The implications of this Proposal would have been far-reaching since it gave TCNs established in a Member State an individual right to provide services in another Member State. See Blanke and MacGregor 2002, p. 189.
[328] COM (1999) 3 final, p. 12..
[329] See Recital 4 of the Preamble to the Draft Directive.
[330] Article 2 of the Draft Directive.
[331] Article 3(3) of the Draft Directive.

work permits for posted workers, even without any 'service provision card' issued by the home state. The proposed directive would have been, however, a welcome addition to the Court's case law since not all Member States had yet done away with their entry and work permit requirements[332]. Both of the service proposals, however, were not successful and they were withdrawn in 2004. The PWD that was adopted in 1996 did not have any better success in this regard; it does not include any provisions on posted workers that are third-country nationals. Recital 20 of the Directive's Preamble, however, contains an important declaration: the Directive is 'without prejudice to national laws relating to the entry, residence and access to employment of third-country workers'. Thus, the PWD explicitly recognises the Member States' reluctance to affect the national competence over the admittance of TCNs in the capacity of posted workers.

A decade later a provision concerning posted TCNs was included in the Commission's proposal for a Draft Services Directive[333]. The proposal would have created wider legal certainty as it clearly provided what the Member States could require concerning posted TCNs. Once again, it stated that the host Member State may not require posted workers to hold an entry, exit, residence or work permit, or to satisfy other equivalent conditions[334]. The responsibility over the legal status of a TCN was laid on the Member State of origin that, according to the proposal, would ensure that a provider posts only workers who are lawfully resident and employed in its territory in accordance with its own national rules[335]. As it has already been noted before in this thesis, all rules concerning posted workers, as well as labour law in general, were deleted before the final version of the Services Directive was adopted.

In the following chapter a case study on posted third-country workers demonstrates how the Court has based its reasoning on Treaty provisions in a situation where the Community legislator has chosen not to act on the matter. The TCNs' special status as posted workers

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[332] So far, the Court had not yet precluded the possibility to require entry visas and residence permits; only work permits had been rejected. In this respect, the Proposal went further than the pre-existing case law. On the other hand, the requirement to obtain an EC service card may also be seen as an additional administrative burden, notwithstanding the fact that the card would have been granted by the Member State of origin.
[333] COM (2004) 2 final/3.
[334] COM (2004) 2 final/3, Article 25(1) of the Draft Directive. However, according to the same article this would not prejudice the possibility for Member States to require a short-term visa for TCNs who are not covered by the mutual recognition regime provided for in Article 21 of the Convention implementing the Schengen Agreement. See the Schengen *acquis*, OJ L 239, 22.9.2000, p. 19–62.
[335] COM (2004) 2 final/3, Article 25(3).

is based solely on Article 49 EC, since neither the PWD nor other secondary legislation contain any provisions to this effect. Acting in the interest of service providers, the Court has gone much further than Member States ever did: no test for labour market access may be applied and no work permits may be required when service providers post their third-country employees to work in other Member States. Applying Article 49 EC, the Court has regarded several restrictions to the TCNs' capacity to work in other Member States contrary to the freedom to provide services. As we have seen in the previous chapter, since the PWD entered into force in 1999 the Court has usually examined national requirements restricting the use of posted workers in conjunction with both the PWD and Article 49 EC. When it comes to posted third-country workers whose position is not regulated in the PWD, Article 49 EC has been applied alone. The application of the PWD, however, is not excluded in cases where posted TCNs are subject to stricter employment conditions than the level provided for in that Directive.

Although the Court's case law on posted third-country workers is truly innovative, one should however keep in mind that it only applies to a relatively limited group of persons. Even though cross-border posting has great potential for the future, it cannot address the needs of the EU-wide labour market as effectively as a harmonised labour migration policy could. The Commission has long taken the view that the internal market logically implies the free movement of all legally resident TCNs. However, this view has constantly been challenged by Member States willing to hold on to their protective measures. The development of a common immigration policy has been burdened by concerns over growing unemployment and problems regarding human trafficking, international terrorism and illegal immigration. Furthermore, especially trade unions have been worried about TCNs' willingness to be content with a lower standard of working conditions than EU citizens. The Amsterdam Treaty made progress by bringing the entire entity of immigration under the Community rules from its earlier location within the framework of inter-governmental cooperation. Whether Member States have the political will to proceed with the Commission's new proposals on labour migration remains uncertain for the moment[336]. When it comes to any issue concerning TCNs, one has to remember that

[336] On 16 October 2008 the European Council adopted a "European Pact on Immigration and Asylum" where the Member States' conviction to develop a common immigration policy was once again acknowledged. This political document sets a number of far-reaching goals on legal and irregular migration, border controls and asylum. The Pact has, however, been criticised for its tough approach against illegal immigrants and concentration on highly skilled immigrants only. Moreover, it seems that the aims of the 'EU Blue Card'

immigration is a field that has traditionally been at the very core of the Member State sovereignty[337]. That notion might change in the near future considering the reality some European countries are already facing with regards the shortage of workforce. While the Member States are benefiting from and becoming growingly dependent on their immigrant labour, it would be only just if the legal status of third-country nationals would change accordingly[338]. Since the internal market indeed implies the free movement of all people living in the EU, third-country nationals should also be included in the European project of uniting people instead of states.

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proposal are already being greatly compromised in the ministerial negotiations between the Member States. See "EU ministers seal immigration pact, progress on labour card", EUbusiness, 25.9.2008, available at: <http://www.eubusiness.com/news-eu/1222345927.24> Cited on 5 November 2008.

[337] The traditional approach is well reflected in the Council's new Pact. *Carrera* and *Guild* criticise the Pact, and the French Presidency under which the document was prepared, for being oriented towards intergovernmental logic and nationalism instead of promoting the existing Community competence. See "French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?" Sergio Carrera and Elspeth Guild, CEPS Policy Brief, No. 170, 2008. Available at: <http://www.libertysecurity.org/IMG/pdf_The_French_Presidency_s_European_Pact_on_Immigration_and_Asylum.pdf> Cited on 5 November 2008.

[338] A probable scenario, however, is that legal developments become driven by demographic rather than by legal or moral pressures facing the EU. See Hedemann-Robinson 2001, p. 586. While it is likely that the Member States will have willingness to upgrade the legal status of highly-skilled workers, the situation might be different when it comes to immigrants without university diplomas or other high qualifications.

6 National Immigration Rules Take the Form of an Administrative Burden

6.1 The Beginning: *Seco and Desquenne*

The crucial differentiation in law between independently moving and posted third-country workers is founded on the case law of the ECJ. Judging by the reluctance of Member States to drop the control of entry and sojourn of posted workers, it is likely that such differentiation would never have emerged without the Court. In its case law on posted third-country workers the Court has established that the right of entry to a Member State to provide a service applies not only to the undertaking providing the service but also to its workers, irrespective of their nationality. Moreover, the Court has held that posted workers' work permits should be in a way 'mutually recognised' in all Member States. By analogy to the case law on recognition of professional qualifications and authorisations acquired in the state or origin, the Court has established that Member States should be able to mutually trust one another when it comes to controlling the legality of third-country workers' employment.

The Court's first ruling on posted workers was also the first time a question concerning third-country workers was put before the Court. In the *Seco and Desquenne* case[339] of 1982 the workers concerned happened to be nationals of a non-Member State posted to a construction site in Luxemburg by two French undertakings. The actual matter concerned was whether the French undertakings providing their services temporarily in Luxemburg were under an obligation to pay the employer's share of social security contributions to an old-age and invalidity insurance scheme in that state. The obligation imposed was based on an assumption that otherwise employers would be tempted to use foreign labour in order to alleviate the burden of paying their share of social security contributions in Luxemburg. An important factor with regard to TCNs was that in practice employers were no longer required to pay contributions in respect of posted workers who were nationals of a Member State or persons treated as such[340]. Moreover, in the course of the proceedings the host state's authorities submitted that since Luxemburg was entirely entitled to refuse the entrance of third-country workers on its territory or to undertake paid employment there,

[339] Joined cases 62/81 and 63/81, *Seco and Desquenne* [1982] ECR 223.
[340] Ibid., para. 4.

the state could attach to any work permit such conditions as it considered necessary, for instance the payment of the employer's share of social security contributions[341].

For the reasons that have been explained before in Chapter 4, the Court ruled that the French undertakings could not be required to pay the employer's share of social security contributions while providing their services in Luxemburg[342]. Concerning the Member State's claimed capability to subjugate the grant of work permits to the payment of such contributions the Court stated that the argument could not be accepted. This was due to the fact that a Member State's power to control the employment of TCNs could not be used for imposing a discriminatory burden on undertakings enjoying their freedom to provide services[343]. At that time the Court had not yet started to consider all impediments to the free movement of services as restrictions subject to be justified by requirements in the general interest[344]. The threat to grant work permits only to those third-country workers whose employer had paid his share of social security contributions in the host state was, however, based on covert discrimination that could not be justified by the general interest in providing workers with social security[345].

The *Seco and Desquenne* case's contribution with regard to posted TCNs was that for the first time the Court acknowledged that conditions imposed on third-country workers have an effect on their employer's right to provide services. In *Seco and Desquenne* the result was quite evident since with respect to social security contributions there was nothing to differentiate third-country workers from such workers who were nationals of a Member State. It is hard to see any reason why the employers' contributions should have been paid for the employment of TCNs, while the requirement was not applied with respect of Member States' nationals. Luxemburg's unsuccessful attempt to justify its practice was evidently based on a simple assumption that TCNs would be more easily exploited.

Since *Seco and Desquenne* only relates to employer's contributions to social funds, it does not go into the very essence of the problematic issue concerning posted third-country

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[341] Ibid., para. 11.
[342] Ibid., para. 9–10. The undertakings were already subject to the same requirement in their state of origin. Furthermore, posted workers were not gaining any benefit of those contributions paid in Luxemburg.
[343] Ibid., para. 12.
[344] See the later case C-76/90, *Säger* [1991] ECR I-4221, para. 12, where the Court reached such a conclusion.
[345] Joined cases 62/81 and 63/81, *Seco and Desquenne* [1982] ECR 223, para. 8–10.

workers' right to work in other Member States. Actually, in *Seco and Desquenne* the Court even admitted that Member States have 'the power to control the employment' of TCNs[346]. The only addition to this statement was that such a power could not be used to discriminate against guest service providers. Hence, in *Seco and Desquenne* the Court was not yet ready to enter further into the issue concerning the host state's entitlement to control the entry and employment of posted third-country workers. Keeping that in mind, one can only marvel at the Court's boldness eight years later when it gave the ruling in *Rush Portuguesa*[347]. The principles established in that judgment were only boosted further in 1994 in the *Vander Elst*[348] case. These are the cases I shall now turn to.

6.2 The Ground-breaking Cases: *Rush Portuguesa* and *Vander Elst*

6.2.1 Free Movement of Staff

The *Rush Portuguesa* case concerned cross-border posted workers, who did not, at the time they were posted, enjoy the freedom of movement for workers while their employer was able to claim freedom to provide services. Rush Portuguesa Lda was a Portuguese undertaking that entered into a subcontract with a French undertaking for the construction of a railway line in the west of France. For that purpose it sent some of its Portuguese employees to work in France. However, by virtue of the exclusive right conferred on it by the French Labour Code, only the French Immigration Office could recruit nationals of third countries to work in France[349]. Having found out that the Portuguese company had not complied with the requirements of the Labour Code, the immigration office notified that it was required to pay a special contribution because of its breach. In the proceedings for the annulment of the decision Rush Portuguesa claimed that it had freedom to provide services within the Community and that the application of national legislation had the effect of prohibiting its staff from working in France.[350]

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[346] Ibid., para. 12.
[347] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417.
[348] Case C-43/93, *Vander Elst* [1994] ECR I-3803.
[349] The Portuguese workers were actually not TCNs but Community nationals. They, however, did not enjoy the right to free movement on their own since during the transitional period after the accession of Portugal to the EU in 1986, the free movement of Portuguese workers was not applied until the end of 1992. The free movement of services, on the other hand, was not subject to any transitional period.
[350] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417, para. 1–4.

The principal question of *Rush Portuguesa* was thus the relationship between the freedom to provide services and the derogations from the freedom of movement for workers provided for in the Portugal's Act of Accession[351]. The Court started to examine this relationship by noting that based on Article 50 EC [then Article 60 EC] a provider of services may temporarily pursue his activities in a Member State where the service is provided under the same conditions as the nationals of that state. From this the Court reached the conclusion that Articles 49 and 50 EC require that a provider of services should be able to move freely on the host state's territory with all his staff. Moreover, the said articles precluded the host state from making the movement of staff subject to restrictions such as a condition to engage his workforce *in situ* or an obligation to obtain a work permit. According to the Court, to impose such requirements on a provider of services discriminates against that person in relation to his competitors established in the host state since the latter are able to use their own staff without any restrictions. Moreover, such conditions affect the ability of the provider of services to go through with his activity in the host state[352].

Notwithstanding the fears of the old Member States, the Court held that the reasons behind the Act of Accession's derogation for independent workers under Article 39 EC were irrelevant to the case at hand. According to the Court, the purpose of this derogation was the prevention of possible disruption to the labour markets after the accession of a new Member State due to large and immediate movements of workers. The situation is different, however, in a case where there is only a temporary movement of workers. In fact, such temporary workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.[353] Therefore, contrary to public concerns of some Member States, the Court did not see any notable threat in occasional third-country workers who did not seek access to the labour market in the host state. It, however, added that the host state should be able to ascertain that the Portuguese undertaking was not availing itself of the freedom to provide services for another purpose, for example for bringing its workers for the purposes of 'placing workers or making them available' in breach of the Act of Accession[354]. In this respect, the

[351] Ibid., para. 7–10.
[352] Ibid., para. 12.
[353] Ibid., para. 13–15.
[354] Ibid., para. 17.

Court had in the previous paragraph stated that since the concept of the provision of services covers very different activities, the conclusions reached in *Rush Portuguesa* might not be appropriate in all cases. The Court referred particularly to undertakings engaged in the making available of labour, meaning undertakings hiring out workers. Since such undertakings carry on activities that are specifically intended to enable workers to gain access to the labour market of the host state, the Act of Accession would preclude the hiring out of workers from Portugal by an undertaking providing its services in other Member States[355]. Hence, the Court gave the host state the right to ascertain that the Portuguese undertaking was not engaged in such activities. A necessary addition was that the host state checks must observe the limits imposed by Community law: the freedom to provide services may not be rendered illusory and its exercise may not be made subject to the discretion of the authorities[356].

The principle that service providers must be able to move freely with all their staff was reinforced in a later judgment *Vander Elst*[357]. In this case the Court went one stage further by confirming that Articles 49 and 50 EC likewise preclude the host state from obliging a guest service provider to obtain work permits for lawfully and habitually employed nationals of non-Member States[358]. The *Vander Elst* case can be distinguished from its predecessor in the sense of the scope of TCNs it relates to. In *Rush Portuguesa* it was the transitional arrangements limiting the right of free movement of Portuguese nationals that were at stake. *Vander Elst*, on the other hand, concerned a Belgian provider of services that wished to send four Belgian and four Moroccan employees on a demolition job to France for a period of one month. Mr *Vander Elst*'s employees were all legally resident in Belgium, held Belgian work permits, were covered by the Belgian social security scheme and were also paid in Belgium. For the Moroccan workers, the employer had obtained short-stay visas for one month's stay in France[359]. This precaution did not, however, save the employer when French employment inspectors made a check at the work site and

[355] Ibid., para. 16.
[356] Ibid., para. 17.
[357] Case C-43/93, *Vander Elst* [1994] ECR I-3803.
[358] The intervening Governments actually argued that the Court's findings in *Rush Portuguesa* could not be extended to the *Vander Elst* case since *Rush Portuguesa* only related to nationals of a Member State, which meant that their employer was entitled to a broader protection for his right to provide services. In his opinion, Advocate General *Tesauro* considered this argument to be totally irrelevant since the issue concerned the rights of service providers that were not related to the nationality of their workers. See Case C-43/93, *Vander Elst* [1994] ECR I-3803, opinion of Advocate General Tesauro, delivered on 1 June 1994, para. 19.
[359] The case took place in 1989 when the *Schengen* cooperation did not yet allow for free movement between Belgium and France. An entry visa was required for TCNs to access France from the Belgian territory.

informed that a short-stay visa was not sufficient to enable the Moroccan workers to take up paid employment in France. As a penalty, a special contribution to the French Migration Office was imposed. The employer, Mr *Vander Elst*, then brought the case before an administrative court and claimed that the work permit requirement and the payment of a fee that was attributed to the employment of third-country workers constituted a barrier to its freedom to provide services.[360]

In its preliminary ruling the Court, as a first step, established that the referring court wanted to know whether guest service providers could be obliged to obtain work permits for their lawfully and habitually employed third-country workers and pay the costs related to such permits while an administrative fine was imposed as a penalty for infringement of that obligation. The Court continued by stating that the requirement, especially when it was coupled with a heavy administrative fine imposed for non-compliance, could entail a considerable financial burden for the employer[361]. Having said that, the Court cited its famous statement on the abolition of any restriction to the freedom to provide services that it had given a couple of years earlier in *Säger*[362]. Interestingly, the Court assimilated the work permit requirement with an administrative licence it had held in *Säger* to constitute a restriction to the freedom to provide services. With regard to the required fee, the Court referred to *Seco and Desquenne* where it had held that the payment of fees for the employment of workers for whom the employer is already liable to pay similar fees in the state of origin means that such an employer has to bear a heavier financial burden than the host state's employers[363].

In *Vander Elst* the Court thus emphasised the nature of a work permit requirement as a restriction to the freedom to provide services in a way similar to authorisation and licence requirements. Such a requirement could be justified only by rules relating to 'overriding reasons in the general interest' that are applied to all persons and undertakings operating in the host state's territory. Furthermore, the Court added the very important condition that restrictive rules are allowed only in so far as the interest pursued is not safeguarded by the

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[360] Case C-43/93, *Vander Elst* [1994] ECR I-3803, para. 1–9.
[361] Ibid., para. 12.
[362] Case C-76/90, *Säger* [1991] ECR I-4221, para. 12. In *Säger* it was established that Article 49 EC prohibits any restriction to the freedom to provide services if it is liable to prohibit or otherwise impede the activities of a service provider that lawfully provides similar services in his state of establishment.
[363] Case C-43/93, *Vander Elst* [1994] ECR I-3803, para. 15.

rules to which the service provider is subject in the Member State of origin.[364] In his opinion on the case, Advocate General *Tesauro* held that to impose a work permit requirement on service providers posting their workers to France constituted 'a wholly unjustified duplication of burdens and formalities liable to put them at a disadvantage in competing with national providers of services'[365]. On its behalf, the Court reached the same conclusion, although with a slightly milder formulation. First, it noted that the provision of services could not be made subject to all the conditions required for establishment. Secondly, the work permit system was intended to regulate access to the French labour market for workers from third countries. Since the Moroccan workers were all lawfully resident in Belgium where they had been issued work permits and since they were not seeking access to the French labour market, the Court held that the requirement went beyond what could be laid down as a precondition for the provision of services in France.[366] Hence, the Court's main emphasis was on the 'market access test', which it upheld in a similar way to which it had done in *Rush Portuguesa*[367].

In *Vander Elst* the Court did not address the issue of whether Member States could impose the requirement of a short-stay visa on posted third-country workers. That did not become topical since the service provider had voluntarily approved of this condition and had acquired short-stay visas for his workers. Therefore, the questions for a preliminary ruling were limited to the requirement of a work permit that is a heavier requirement than a short-stay visa. In *Vander Elst* the Court only stated that the short-stay visas constituted valid documents permitting posted workers to remain in France for as long as was necessary to carry out the work. Consequently, the national legislation applicable in the host State concerning the immigration and residence of aliens had been complied with[368]. It remains unknown what the Court would have ruled on the short-stay visa requirement had it become necessary. At the time the internal borders had not yet been abolished and France was perfectly entitled to control the entry of persons on its territory. Therefore, a probable result is that the Court would have upheld the Member States' right to demand entry visas

[364] Ibid., para. 16.
[365] Case C-43/93, *Vander Elst* [1994] ECR I-3803, opinion of Advocate General Tesauro, delivered on 1 June 1994, para. 17.
[366] Ibid., para. 17–22.
[367] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417.
[368] Ibid., para. 19.

since TCNs were not able to cross a border without them[369]. The Schengen Convention became applicable in France and Belgium in 1995, which means that the situation has changed accordingly. This is demonstrated by the judgment in the *Commission v Austria* case[370] that is examined below.

It is also worth noting that although the Court in *Vander Elst* boldly held that no work permits could be required even for workers who were not nationals of any Member State, the situation was to some extent less radical than in *Rush Portuguesa*. This is because *Vander Elst* concerned a posting between two old Member States with a similar socio-economic level[371]. The Court makes a very important point in *Vander Elst* when it states that the application of the Belgian system substantially excludes the risk of workers' exploitation or of distortion to competition between undertakings[372]. Although that statement was related to the high level of worker protection in Belgium, it might have had an effect on the prohibition to require work permits for the Moroccan workers. A 'mutual recognition' of work permits even for genuinely non-European workers was easier to accept when they were posted from a country whose system 'excludes any substantial risk of workers being exploited'. Belgium was surely trusted as having a similar level of immigration control against illegal third-country workers as France. Although the ruling in *Vander Elst* did not limit the prohibition of work-permit requirements to any specific countries, the reference to the Belgian system's reliability is noteworthy.

6.2.2 Access to the Host State's Labour Market

From a legal point of view, a remarkable element of the Court's case law concerning posted workers is the Court's position that Article 39 EC does not apply to them[373]. Staying in that position the Court has been able to sidetrack the application of such host state rules that would otherwise have been applied to the full. In *Rush Portuguesa* and *Vander Elst* the Court established that the very essence in the different application of Articles 39 and 49 EC with relation to foreign workforce is the capacity of such workers to

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[369] One option is that Member States could have been required to issue group visas or some other type of declarations on the basis of which posted workers may show their entitlement to cross a border.
[370] Case C-168/04, *Commission v Austria* [2006] ECR I-9041.
[371] See Hellsten 2007, the second article, p. 11.
[372] Case C-43/93, *Vander Elst* [1994] ECR I-3803, para. 25.
[373] See Verschueren 2008, p. 173.

enter the labour market of the host state. The emphasis the Court puts on the access to labour market, or on the absence of such access, has been subject to some criticism. *Hellsten* takes the view that the distinction made by the Court between posted workers who return to their home state and those who do not is artificial[374]. According to him, the differentiation seems misleading considering that there is not necessarily much difference in the way an independent and a posted worker enter the host state's labour market. While a worker moving on his own initiative to the host state for one day is considered entering the labour market, a worker posted there for a period of several years is not. *Hellsten* argues that the internal market should be seen encompassing just one labour market within which workers are posted. In a similar way *Bruun* emphasises the central feature of the freedom to provide services that is the involvement of employees[375]. Although from the formal legal point of view the freedoms affecting services and workers are analytically distinct, in practice the free movement of services based on Article 49 EC shares many characteristics with the free movement of workers as enshrined in Article 39 EC.

On the other hand, *Liukkunen*[376] emphasis the difference in the contractual relations: posted workers conclude their employment contracts in their home state. Since they are carrying out their work for a limited period in another state, their employment contracts have connections with more than just one country. Therefore posted workers cannot be seen as entering the host state's labour market in the same way as independent workers who move to another Member State basing their rights on Article 39 EC. In addition, it is worth noting that posted workers stay within the home state's social security system and are not granted access to the host state's welfare services. To a large extent, outside the mandatory requirements of the PWD, their employment is still regulated by the legislation of the state of origin. Although the distinction between independent and posted workers may seem artificial especially when a posting is of an extended length, there is in any case a significant difference in the regulatory framework of their employment.

The decision the Court took in *Rush Portuguesa* and *Vander Elst* is not limited to immigration rules only. It has had far-reaching consequences in the posting of workers in general since after those rulings the issue concerning applicable legislation has been

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[374] Hellsten 2007, the second article, p. 9.
[375] Bruun 2006, p. 19.
[376] Liukkunen 2006, p. 192.

regarded from the viewpoint of the free movement of services. Earlier, many had argued that Article 39 EC should apply to posted workers since based on the principle of equal treatment they should be subject to the same benefits and obligations as other employees working in the same country. After *Rush Portuguesa* and *Vander Elst*, one could continue this argument by claiming that the differentiation between the application of Articles 39 and 49 EC in these two cases was designed to diminish the importance of the host states' immigration laws and not make Article 39 EC inapplicable altogether.[377] In *Finalarte*[378], the Court however made it clear that it was going to continue on the same track also with regard to labour law rules. What matters the most is that no posted worker, a TCN or a national of a Member State, is seeking to access the labour market of the host state. At the same time the Court has, however, left the door open for the possibility that in some cases there might actually be an access to the local labour market even in posting situations. Already in *Rush Portuguesa* the Court indicated that if an undertaking is engaged in the making available of labour, it is carrying on activities that are intended to enable workers to gain access to the host state's labour market[379]. The Court has repeated that position in later judgments although not always as explicitly[380]. Judging by the Court's formulation it seems possible that if a service provider is engaged in hiring out workers to undertakings established in other Member States, work permits could still be required[381]. The Court's exact position on the issue remains uncertain until it will get an occasion to give a ruling concerning cross-border hiring of labour from this point of view.

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[377] Verschueren 2008, p. 174–175. It is, however, hard to see how Article 39 EC could be applied to posted third-country workers since that Article only covers nationals of the Member States. In this respect, it must be seen that the requirement of equal treatment is based on a more general principle than on Article 39 EC.
[378] For the first time the Court expressly stated that Article 39 EC does not apply to posted workers in its ruling in joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and others* [2001] ECR I-7831, para. 23.
[379] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417, para. 16. The Court held that the Act of Accession precludes the Portuguese undertaking from making workers available for the French labour market.
[380] See C-445/03, *Commission v Luxemburg II* [2004] ECR I-1019, para. 39 and case C-244/04, *Commission v Germany II* [2006] ECR I-885, para. 39–40.
[381] All in all, it seems that the principles established in *Rush Portuguesa* and *Vander Elst* apply to the most traditional posting situation that corresponds to Article 1(3)(a) of the PWD. When it comes to the other two posting situations under the PWD (in-group postings and temporary employment agencies), the result concerning the host state's immigration control might be somewhat different.

6.3 The Narrowing Margin of Discretion

6.3.1 Abolition of 'Vander Elst Visas'

The first judgments on posted workers enjoying their right of free movement through their employer left some important questions unanswered. *Rush Portuguesa* did not address the question of entry and residence permits at all, while in *Vander Elst* there was no need to address the issue on admittance since the national requirements for access to territory had been complied with.[382] Therefore, the central issue of those cases was the access to the host state's labour market and not the access of third-country workers to the host state's territory. The Court's ruling in *Vander Elst* gave a reason to change legislation or administrative practices in a number of Member States. However, the ruling was, quite understandably, interpreted strictly so that Member States still saw themselves entitled to require short-stay visas from posted workers of third-country nationality. The granting of entry visas was usually not automatic and in some Member States work permits were still required[383]. Moreover, the Court's formulation of 'lawful and habitual' employment in the state of origin gave rise to problems. In the *Vander Elst* case the Court had said that work permits may not be required where posted TCNs are lawfully and habitually employed by the posting undertaking[384]. This made many Member States come to the conclusion that they could establish complicated authorisation procedures to make sure that the posted workers' situation was lawful in the state of origin and that their employment relationship was on a secure and stable basis. Consequently, the Member States started to require so-called "Vander Elst Visas" for non-EU nationals posted to their territory for a short-term assignment[385]. Although such authorisations did not always amount to work permits, they nevertheless considerably restricted the free movement of service providers' workforce.

It took some years for the 'Vander Elst visas' to reach the ECJ. The first significant ruling was *Commission v Luxemburg*[386], which was the result of the infringement proceedings commenced by the Commission in 2002. Notwithstanding the judgment in *Vander Elst*,

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[382] Hailbronner 2000, p. 194.
[383] For work permits, see case C-445/03, *Commission v Luxemburg II* [2004] ECR I-10191.
[384] Case C-43/93, *Vander Elst* [1994] ECR I-3803, para. 26. See Peers 1995, p. 306.
[385] An enlightening example is the Internet site of an immigration advice company. It explains that a new visa category ('Vander Elst visa') has evolved and gives advice on how to obtain the visa in the Netherlands. <http://www.workpermit.com/netherlands/employer_van_der_elst.htm> Cited on 10 November 2008.
[386] C-445/03, *Commission v Luxemburg II* [2004] ECR I-10191.

Luxemburg was still making the posting of third-country workers subject to the acquisition of individual work permits or a collective work permit. On the issue of such permits, the Luxemburg authorities depended on considerations relating to the situation, evolution and organisation of the national labour market. Moreover, a collective work permit was issued only to those workers who were in an employed relationship of indefinite duration and on the condition that their work contract had begun at least six months prior to posting.[387] Luxemburg argued that the requirements were justified since they intended to eliminate the risk of abusive exploitation of TCNs and the dangers of distortion of competition due to social dumping. The Court, obviously, did not accept the arguments since it had already established that work permits (now referred to as the 'work licensing system') cannot be regarded as constituting appropriate means for worker protection.[388] With regard to the requirement of six months employment prior to posting, the Court held that it was liable for making the posting of workers considerably difficult in such sectors where short-term and service-specific contracts were used frequently.[389] According to the Court, instead of a work licensing mechanism a less restrictive and a more appropriate measure would be to impose on posting undertakings an obligation to report to the local authorities beforehand on the presence of posted workers. Such practice would allow local authorities to monitor the compliance with social welfare legislation while taking into account the obligations by which the undertaking is already bound in the Member State or origin.[390]

The conclusions reached by the Court on the Luxemburg system were confirmed a little more than a year later in the *Commission v Germany*[391] case. Germany's national legislation on posting of TCNs was very similar to Luxemburg. However, Germany did not require work permits but special 'Vander Elst visas' instead. The particularity of that visa was that the authorities had little discretion for the issuing of such visas, which made their granting fast and almost automatic. Moreover, they were only required for those posted workers who did not have a Schengen visa or residence permit issued by a Member State. In case a TCN was in possession of one of those documents, the 'Vander Elst visa' was required only if the worker was posted for a period of more than three months.[392]

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[387] Ibid., para. 1–7.
[388] Ibid., para. 24, 28, 30.
[389] Ibid., para. 33–34.
[390] Ibid., para. 31.
[391] Case C-244/04, *Commission v Germany II* [2006] ECR I-885.
[392] Ibid., para. 19–20.

Notwithstanding the automatic nature of the 'Vander Elst visa', the Court stated that the requirement went beyond necessary and said that a simple prior declaration must suffice. Thus, the Court made it clear that any checks made in advance are to be considered excessive[393]. The Court did not, however, give any guidance on the question of how to deal with such third-country workers who do not hold the necessary documents for residence in the host state's territory. That question became topical in a later case that I shall now turn to.

6.3.2 *Commission v Austria*

In the *Commission v Austria*[394] case the Court did not only reject the Austrian version of a 'Vander Elst visa', but it also rejected the automatic expulsion of such third-country workers who have entered the Austrian territory unlawfully. The case concerned the obligation to obtain an authorisation before an employer that did not have its registered office in Austria could employ TCNs within that Member State. The national legislation provided for a special procedure as regards the posting by those undertakings with their registered office in the EU. On those occasions the authorisation was replaced by an 'EU Posting Confirmation' that was granted subject to the fulfilment of certain conditions. The main requirement was that the TCNs were to be declared to the regional office of the Employment Service before the provision of services could commence. The competent regional office of the Employment Service then issued an acknowledgment of that declaration ('EU Posting Confirmation') within six weeks. The confirmation was granted on the condition that the worker posted had been lawfully and habitually employed for at least one year, or had concluded a contract of indefinite duration, with the undertaking employing him in the Member State of origin. In addition, TCNs were required to hold a visa and residence permit in order to enter and reside in Austria. Where a national of a non-Member State entered Austria illegally, his position could not be regularised *in situ* by the issue of an entry or residence permit. Moreover, employers had to declare all the workers that were posted in Austria to the central coordinating office for the control of illegal employment at least one week before the work was due to commence.[395]

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[393] Ibid., para. 41, 45–46.
[394] Case C-168/04, *Commission v Austria* [2006] ECR I-9041.
[395] Ibid., para. 1–9.

In its ruling the Court firstly dealt with the EU Posting Confirmation. It was held that the Posting Confirmation constituted an authorisation procedure likely to render difficult, if not impossible, the provision of services using posted workers from a non-Member State. The Court dealt with the confirmation and the justifications invoked by the Austrian Government in a manner similar to the earlier judgments on Luxemburg and Germany.[396] The Commission's second complaint concerning the automatic nature of the refusal of the entry and residence permit was something new. In its answer the Court first reminded that TCNs entry into a Member State and residence there in connection to posting was not harmonised at Community level. However, the Court then noted that 'the control exercised by a Member State so far as that legislation is concerned cannot affect the freedom to provide services of the undertaking which employs those nationals'[397]. Accordingly, Member States should not make it impossible to regularise the situation of TCNs that are posted to a Member State even if they have entered the territory of that Member State without a visa. Such a requirement exposes the worker in question to the risk of being excluded from the national territory, which is liable to jeopardise the planned posting. The Court considered it to be too burdensome for service providers to ensure that each worker concerned is in possession of a permit to enter the host state. Thus, the Court came to the conclusion that the threat of posted third-country workers being expulsed was likely to dissuade an undertaking from using TCNs in its provision of services.[398]

In its submissions the Austrian Government argued that if Member States would have to regularise the situation of unlawfully residing TCNs *in situ*, they would be deprived of their right to refuse a residence permit to a person presenting a risk to public policy or public security[399]. According to the Austrian Government, that was an issue concerning the law on aliens, not the freedom to provide services[400]. In its answer the Court admitted that there certainly existed an offence for a TCN, to whom visa requirements apply, to enter a Member State without a visa. However, the automatic prohibition on granting an entry or residence permit to such a worker constituted a disproportionate sanction to the gravity of

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[396] Ibid., para. 40–42, 48–58. The 'EU Posting Confimation' was rejected since it was not merely a declaratory procedure. Moreover, various other conditions had to be fulfilled before posting of TCNs could take place. The Court considered them disproportionate to the objectives pursued.
[397] Ibid., para. 60.
[398] Ibid., para. 59–62.
[399] Case C-168/04, *Commission of the European Communities v Republic of Austria* [2006] ECR I-9041, opinion of Advocate General Léger, delivered on 23 February 2006, para. 98.
[400] Case C-168/04, *Commission v Austria* [2006] ECR I-9041, para. 34.

the offence. According to the Court such prohibition disregarded the fact that the posted worker, who does not possess a visa, is in a lawful position in the Member State from which he has been posted and does not pose a threat to public policy or public security.[401]

The judgment in *Commission v Austria* is fundamental in the sense it considers usual measures that are applied to illegally residing non-nationals as disproportionate sanctions when applied to posted workers. Earlier, the Court had not clearly stated what would be the consequences if a TCN were in an unlawful situation in the host state. Since it had rejected the prior authorisation requirement, it was however clear that such a situation would arise sooner or later. It is interesting to contemplate what implications the judgment in *Commission v Austria* has in practice. It is hard to think of many situations where a TCN's situation is lawful in one Member State but not in another. Within the Schengen area also TCNs are able to move freely across the internal borders if they are holders of a Schengen visa or residence permit. From non-Schengen countries, the United Kingdom, Ireland and those new Member States that are still outside the Schengen area, TCNs are not able to access the rest of the EU without Schengen visas. It is thus hard to see how they could end up working inside the Schengen area without obtaining an entry clearance in the form of a Schengen visa or other applicable permit for admittance. An unlawful situation may therefore occur mainly when a TCN illegally crosses one of the Schengen area's external borders or when a TCN stays in the host state for a period exceeding the validity of his visa, or in case of two Schengen states, the validity of his residence permit. Moreover, in the latter situation difficulties may occur when a third-country worker has been posted to a Schengen state for a period over three months since the Schengen Convention authorises only such sojourns for TCNs that last for less than three months. Furthermore, the Schengen Convention does not provide for any substantive rules on temporary sojourns for working purposes. According to Article 22 of the Convention a TCN who has legally entered the territory of one of the Schengen states may be obliged to report his presence to the competent authorities of that state. Since a requirement to report the presence of third-country workers can be seen as an obstacle to the freedom to provide services, it is thus unclear whether the Schengen Convention is compatible with the principles of equal

[401] Ibid., para. 65.

treatment of service providers as pronounced in the Court's case law on posted third-country workers[402].

With regard to family members of EU citizens, who also have a derived right of free movement within the EU, the problem concerning the case law's compliance with the Schengen requirements was solved with Directive 2004/38/EC[403]. Articles 5 and 10 of the Directive give third-country family members the right to access the whole area of the EU based on their entitlement to a "Residence card of a family member of a Union citizen". When it comes to posted third-country workers, the Commission's proposal for an 'EC service provision card' would probably have been an ideal solution to posting situations. For the time it seems that due to the fact that some borders in their traditional meaning still exist in the EU, the service providers' right to post their workers to other Member States is not yet entirely free of formalities with regard to the movement of their workers.

6.4 Conclusions on the Case Study

If one ignored the above-examined judgments' connection to immigration law, they would not give much reason for particular academic attention. They would be typical cases in which the need to prohibit a restriction arises in a situation where market access for the provider of services is impeded by a national regulation. In this respect, the early *Rush Portuguesa* case is the only exception since in that judgment the Court regarded the work permit requirement discriminatory by its nature[404]. That conclusion might have resulted from the fact that the workers concerned were Community nationals whose right to free movement was restricted only for a limited period of time. Moreover, at that time the Court had not yet explicitly stated that indistinctly applicable measures are also capable of restricting the free movement of services; the ruling in *Säger*[405] was handed down only a year later. Since *Vander Elst*[406] the Court has, however, constantly applied the 'abolition of any restriction' approach. That is understandable, considering that the need to obtain work permits for posted workers who are TCNs or the need to get an advance authorisation for

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[402] Blanke and MacGregor 2002, p. 187.
[403] See Article 5(2) of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, OJ L 158, 30.4.2004, p. 77–123.
[404] Case C-113/89, *Rush Portuguesa* [1990] ECR I-1417, para. 12.
[405] See case C-76/90, *Säger* [1991] ECR I-4221, para. 12.
[406] Case C-43/93, *Vander Elst* [1994] ECR I-3803, para. 14–15.

work performed by such nationals can be considered as typical restrictions to the provision of services. They can be classified as national requirements, which impose certain conditions that have to be fulfilled before the provision of services may be initiated[407]. Two restrictive situations have to be differentiated with regards to this[408]. Firstly, any form of authorisation requirement discourages the provision of services due to administrative costs and bureaucracy involved. Hence there is a restriction on the provision of services even if the undertaking is not subject to any authorisation in its home state. Secondly, if an undertaking is already authorised to provide services in its home state, the authorisation requirement of the host state amounts to a double burden likely to make the access to that state considerably less attractive. It is the latter situation that applies to posting of TCNs. By requiring posting undertakings to obtain work permits for workers who are not nationals of any Member State the host state is demanding the undertaking to fulfil a condition it is already subject to in the state of origin where it *lawfully* provides similar services[409]. Accordingly, by prohibiting the requirement of obtaining any additional work permits, the Court is applying the principle of mutual recognition to such permits.

It is true that the Member States still remain free to lay down the requirements for obtaining a visa or a residence permit in posting situations. However, it is questionable whether that possibility has much practical significance since the Court has in *Commission v Austria*[410] acknowledged that Member States must not automatically refuse to grant a visa or residence permit to a posted TCN even if he has entered the host state's territory unlawfully. Furthermore, it is clear that when a posting undertaking applies for entry visas for its workforce, that undertaking's freedom to provide services cannot be frustrated by a refusal to issue entry visas for the persons concerned[411]. It seems that in both of the situations an entry visa or residence permit can be refused only in case the refusal is based on grounds linked to the protection of public policy and public security. Such justifications cannot be easily relied on since according to the Court they require the presence of a

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[407] Roth 2002, p. 16.
[408] Roth 2002, p. 16.
[409] A double burden does not, however, exist when a TCN does not need a work permit in the state of origin. Although these situations are rare, they might result from disparities between Schengen and non-Schengen Member States. It is also worth noting that I am only referring to such cases where the posted workers' situation is lawful in the state of origin. Naturally, in case of illegal employment no double burden exists.
[410] Case C-168/04, *Commission v Austria* [2006] ECR I-9041, para. 65.
[411] Peers 1995, p. 306.

genuine and sufficiently serious threat to a fundamental interest of society[412]. Furthermore, on the grounds of the 'mutual recognition approach' a posted TCN can hardly pose any threat to public policy or public security when he is in a lawful position in the Member State from which he has been posted[413]. Although the Court has acknowledged that the combat against illegal employment may be an interest worth protection[414], it has considered it to be disproportionate with regard to the smooth functioning of provision of services[415]. When it comes to the need to obtain work permits, there is usually no need to protect the posted workers, only the domestic employment market from illegal labour. Since the host state has the power to decide who is given a work permit, it may as well use that power for economic purposes in order to protect the national employment market. It is thus understandable that the Court has prohibited the work permit requirements and comparable authorisation procedures altogether. The practical effects of the case law on posted third-country workers, however, go further than to the rejection of work permits. The Member States have not been left with much discretion when it comes to their power to control the entry and residence of posted TCNs[416].

In the Court's judgments the interests of service providers and TCNs have interestingly coincided. While the Court has been concerned with the rights of the service providers only, the decision to consider posted workers in that framework has given TCNs at least a passive right of free movement. Distinguishing their situation from independent workers through the 'access to labour market' test, the Court has managed to find a way to circumvent the right of every Member State to control the admission of immigrant workers.[417] Cross-border provision of services poses a great number of legal questions that have not yet been settled. In the future it is likely that many of these will relate to the employment of TCNs. The Member States have not yet been brave enough to extend the application of freedom to provide services to third-country nationals established within the EU. However, considering the need to promote the internal market of services this might

[412] Case C-168/04, *Commission v Austria* [2006] ECR I-9041, para. 63–64.
[413] Ibid., para. 65.
[414] Case C-255/04, *Commission v France* [2006] ECR I-5251, para. 47.
[415] In any case, Member States are still left with the possibility to make the necessary checks to make sure that the posted workers' situation is lawful. The effectiveness of such checks is, however, often contested as it is very difficult to control the presence of foreign work force based on simple prior declarations.
[416] In 1995 *Peers* wrote that the judgment in *Vander Elst* is the most far-reaching application of the Court's decisions on indistinctly applicable restrictions on services. He thought that given a choice between two options, "many Member States might have preferred to accept foreign lottery tickets on their territory than non-EU citizens providing services". See Peers 1995, p. 308.
[417] Houwerzijl 2006, p. 182.

be the necessary step that needs to be taken. Furthermore, since the population structure of the Member States is aging and decreasing in an accelerating manner, TCNs might be the only option to ease the labour shortage that inevitably lurks around the corner[418]. The Court's case law concerning posted TCNs can be seen as the beginning of a development where the rules concerning the various forms of free movement are gradually starting to cover also third-country nationals. However, further harmonisation measures are inevitably needed as the Court can hardly extend its application of the mutual recognition principle very much further in the field of immigration that is still very much dominated by the sovereignty of the states themselves.

[418] See the Commission's Policy Plan on Legal Migration, in which the Commission describes the current situation and prospects of EU labour markets as a 'need' scenario: "Some Member States already experience substantial labour and skills shortages in certain sectors of the economy, which cannot be filled within the national labour markets." COM (2005) 669 final, p. 4.

7 The Court's Rulings on Posted Workers – Foreseeable or Unpredictable?

7.1 The Court and the Social Policy

The variety and complexity of attitudes towards the judgments on posted workers is due to the complexity of the issue; the EU has the obligation to create an internal market without constraints, but at the same time it has to ensure an efficient level of worker protection and social welfare. Taking into account the change from an economic community to a multifaceted union, the objectives of the EU have broadened accordingly[419]. These days there is a wider range of policies complementing the traditional approach of free trade. According to the amended Article 2 EC, the Community has as its task, among others, the promotion of a high level of employment and social protection and the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. Thus, in the modern EU the four fundamental freedoms are always completed with other policies, which relate, for instance, to consumer, social and environmental matters.

With the EU gaining more powers, also the Court is paying greater and greater attention to social, civil and political rights as a counterweight to the rights of free trade participants. The Court has developed its own case law on requirements in the general interest that has increased the possibilities to deviate from the primary nature of the four freedoms of movement. The social policy cases that have a direct impact on individuals have given the Court the possibility to develop some important principles, such as the direct effect of directives[420]. So far the Community's legislative organs have not succeeded in their attempts to include legally enforceable fundamental social rights in the Treaties. This has not stopped the Court from drawing inspiration from other instruments to which the Member States are signatory. Article 136(1) EC explicitly refers both to the European Social Charter[421] and the Community Charter of the Fundamental Social Rights of

[419] Barnard 2007, p. 23.
[420] Barnard 2006, p. 34.
[421] European Social Charter, opened for signature in Turin on 18 October 1961, revised in 1996, Council of Europe.

Workers[422]. Although the insertion is too weak to lead to legally binding obligations or rights[423], these instruments have on several occasions been cited in the Court's case law[424]. In 2000 the European Council, the Parliament and the Commission solemnly proclaimed the Charter of Fundamental Rights of the EU[425]. Although the Charter is not legally binding, it is generally considered as an influential form of soft law[426]. The Court tends to view the Charter as an affirmation of its own approach to the sources of fundamental human rights as general principles of EC law[427].

Through its case law, the ECJ has thus played an instrumental role in enforcing social rights and confirming that the Community has not only an economic, but also a social orientation. An excellent demonstration of this is the Court's ruling in *Deutsche Post*[428] concerning Article 141 EC on equal pay for men and women. Article 141 EC was originally intended to prevent companies in some Member States from losing out to companies in other Member States depending on whether they had on the basis of national legislation to respect equal pay or not. In its earlier case law the Court had thus recognised the economic function of Article 141 EC. However, when ruling on the issue in the year 2000 the Court also paid attention to the social objectives of the provision. It declared that 'the economic aim pursued by Article 119 [now Article 141] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right[429].' According to *Barnard*, the Court's ruling in *Deutsche Post* is most significant as it meant an important shift in emphasis from a pure market-based vision to an approach that values a wider range of interests and recognises the need to accommodate them.[430]

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[422] Community Charter of Fundamental Social Rights, preliminary draft, COM (89) 248 final, not published in the Official Journal. The text was adopted in the form of a declaration by the Heads of State or Government of 11 Member States on 9 December 1989.
[423] Blanpain 2003, p. 135.
[424] See, e.g., case 149/77, *Defrenne* [1978] ECR 1365, para. 28, case C-540/03, *Parliament v Council* [2006] ECR I-5769, para. 107, and case C-151/02, *Jaeger* [2003] ECR I-8389, para. 47.
[425] Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, p. 1–22.
[426] Craig and de Búrca 2008, p. 379.
[427] Ibid., p. 402. See also case C-540/03, *Parliament v Council* [2006] ECR I-5769, para. 38.
[428] Joined cases C-270/97 and C-271/97, *Deutsche Post* [2000] ECR I-929.
[429] Ibid., para. 57.
[430] Barnard 2007, p. 23–24.

Notwithstanding the contributions that the Court has made to the promotion of social rights in the EU, many commentators are also critical towards the Court's attitude to expand the Community powers in the social field. Although the Court has on several occasions proved to be the ultimate guardian of individual protection, it is hardly trusted with important choices that touch the very basics of the traditionally national field of social policy. In some cases the Court has been criticised for being too market-oriented. Some consider that such an approach contradicts with the European tradition, in which state intervention in the operation of the market is accepted and even expected. An active Court may be considered harmful to the broader agenda in social policy being developed elsewhere in the EU; in this situation the Court's judgments may seem to lack consistency. Moreover, the Court's case law on social issues poses constant challenges to the integrity of the national system of labour and social protection.[431]

Notwithstanding the development that the recent years have shown in the field of social policy, the measures taken are often part of the so-called 'soft law'. The open method of coordination (the 'OMC') that was defined in the Lisbon strategy involves measures, which may to varying degrees be binding on the Member States but which never take the form of regulations, directives or decisions[432]. Although the OMC, as other instruments of soft law, enables the achievement of common goals in such areas where no binding legislation is possible, its deficiency in the legal sense can create problems. One may ask whether the soft social measures are the right answer to the 'hard' legislation supporting the economic aims of the single market. The question becomes very relevant in the light of the ECJ's case law since the Court's task is to interpret the Community's legal instruments, not the political aspirations of the Member States. As long as the Court lacks competence in the social field, it is constrained to giving judgments based on the economic provisions of the Treaty. According to *Hatzopoulos* and *Do*, in this situation the Court "will necessarily push through the liberal agenda at the expense of the protection of social rights"[433].

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[431] Barnard 2006, p. 35–36.
[432] The OMC is a new intergovernmental method that provides for cooperation between the Member States, whose national policies can thus be directed towards certain common objectives. It is used in areas such as employment, social protection, social inclusion, education, youth and training. See more information at: <http://europa.eu/scadplus/glossary/open_method_coordination_en.htm> Cited on 23 October 2008.
[433] See Hatzopoulos and Do 2006, p. 991.

On several occasions the Court has held that also social policy objectives can and must be balanced with the fundamental freedoms. Even though the Member States remain free to lay down the conditions for the existence and exercise of rights in those areas where the Community does not have competence, they must nevertheless do so consistently with Community law[434]. The critical commentators are of the opinion that through its wide interpretation of the Treaty articles, the Court is extending its legal review too deep into areas, which have not yet been harmonised at Community level. Moreover, the Court has been accused of giving precedence to the fundamental freedoms and examining fundamental rights, including social rights, only incidentally and on a subsidiary level[435]. In this situation some are of the opinion that the Court should be guided in the right direction with legally binding social policy legislation. Such legislation, however, is hard to achieve considering the often-required unanimity in the Council. Moreover, the adoption of even a simple act can take years and the result might be unpredictable due to unavoidable compromises. Thus another popular proposition that has often been put forward by the critics is the restriction of the Court's competencies.[436] Now that the Court has handed down its judgments in *Laval*[437] and *Rüffert*[438], that proposition has once again surfaced not only in the legal literature, but also in the public discussion.

7.2 Foreseeable and Unpredictable

After the Court's rulings in *Laval* and *Rüffert*, there is very little room for speculation as to what is the scope of terms and conditions of employment that posting service providers can be required to observe. The critics of these judgments argue that the Court has taken an approach that is undermining the whole balance of policy that was struck in the PWD. Although the PWD was based on the Court's permissive attitude in early cases like *Rush Portuguesa*, the Court has now taken a much more robust view of what Articles 49 and 50 EC require[439]. The most striking feature of *Laval* is that the Court reached its final conclusions by interpreting a collective action in the light of Article 49 EC. In this context

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[434] On the PWD, see case C-341/05, *Laval* [2007] ECR I-11767, para. 87. As regards social security, see case C-120/95, *Decker* [1998] ECR I-1831, para. 22-23 and as regards direct taxation, case C-446/03, *Marks & Spencer* [2005] ECR I-10837, para. 29.
[435] Skouris 2006, p. 225.
[436] Pakaslahti 2002, p. 62.
[437] Case C-341/05, *Laval* [2007] ECR I-11767.
[438] Case C-438/05, *Viking* [2007] ECR I-10779.
[439] Davies 1997, p. 596.

the Court obviously held that the PWD had exclusively (and exhaustively) defined the contents of that Article.[440] Some argue that the Court's interpretation of the PWD and Article 49 EC is such as to give rise to legal effects to some of the Directive's provisions in a way that is usually described as direct horizontal effect.[441] The Court's message seems to be that when interpreting Article 49 EC prevalence should be given to consistency between that Article and the PWD. This leads to conclude that nowadays Article 49 EC actually ought to be interpreted in the light of the PWD. Therefore, the PWD can be seen as being of indirect importance also to trade unions.[442]

With regard to the right to take collective action, a source of confusion has been the very different conclusion that the Court reached in its other recent ruling in the *Viking* case[443] compared to *Laval*. Although *Viking* equally concerns a collective action taken by a trade union against an undertaking wanting to avail itself of one of the fundamental freedoms of movement (in that case the freedom of establishment), the Court did not preclude the action *per se*. On the contrary, the collective action's proportionality was left for the national court to determine[444]. Many have praised *Viking* for leaving the necessary margin of appreciation to the national level so that the fundamental right to take collective action can be preserved according to the Member States' traditional standards[445]. In *Laval*, on the other hand, the Court did not embark on any balancing act between the fundamental right to take collective action and the fundamental freedom to provide services. The distinguishing factor is that in *Laval* there was secondary legislation to be taken into account, whereas *Viking* was solely based on Article 43 EC. Without the existence of the PWD, the Court might have reached a conclusion similar to *Viking* in *Laval* too[446]. The surprising factor was that through the horizontal direct effect of Article 49 EC the effect of the PWD was extended to trade unions and to their right to take collective action.

It is hard to accuse the Court of faulty reasoning in its literal interpretation of the PWD in *Laval* and *Rüffert*. Considering the wording and the legal basis of the Directive, hardly any

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[440] See case C-341/05, *Laval* [2007] ECR I-11767, especially para. 80, 85, 108.
[441] Malmberg and Sigeman 2008, p. 1134.
[442] Sigeman and Inston 2006, p. 370. The authors cleverly reached such a conclusion already before the Court handed down its ruling in *Laval*.
[443] Case C-438/05, *Viking* [2007] ECR I-10779.
[444] Ibid., para. 87.
[445] See Eklund 2008, p. 564–565 and Malmberg and Sigeman 2008, p. 1130.
[446] It is, however, important to note that the *Laval* case included a discriminatory element (the 'Lex Britannia'), which in any case could not have been justified by the need to protect workers.

other result was conceivable. The Court, however, is not limited to the wording of a legislative instrument. One could argue that instead of clinging to the legal basis, the Court should have paid more attention to the goals and purpose behind the PWD. Moreover, when it comes to the bottom values of the European society, the Court's choice of direction may be subject to criticism. While the social policy objectives are generally gaining more ground in the Community, at the same time the Court is only tightening its control over obstacles to the free movement of services. Considering that a decade has passed since the PWD was legislated, some argue that the Court could have paid more attention to the development of social considerations in the modern EU. Moreover, it is also possible to contest whether the Court's literal interpretation of the PWD was so self-evident after all. Many Member States were arguing that only minimum standards are laid down in the Directive and in general the principle of equal treatment applies between the local and posted workers. Before the Court's ruling in *Laval*, this seemed to be the view of many legal scholars as well[447], and actually it still might be. Although many had seen the PWD as a minimum directive, the Court declared that it to be a piece of exhaustive legislation, as another interpretation would deprive the directive of its effectiveness[448].

For many, the PWD might be another example of the Community law's unpredictability, which demonstrates itself every once in a while[449]. It is first and foremost the Court that is usually accused of creating new principles that change the direction of old and accustomed. The basic problem with the PWD, however, seems to be the legislative instrument itself. If more attention had been paid in the process of preparation, especially to the choice of legal basis, a lot of confusion could have been avoided. The Directive seems to be a perfect example of the difficulties inherent in the Community legal procedure itself. The difficult negotiations that take place in the Council often result in complicated rules and compromises which are not similarly understood even by those who created them. The clarification is thus inevitably left to later judicial decisions.[450] Furthermore, sometimes textual ambiguity of Community legislation is entirely intentional since otherwise a compromise might be impossible to reach. Although the Court has been criticised for

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[447] See, for example, Giesen 2003, p. 153, Bruun 2006, p. 21, 25, Hellsten 2007, the fourth article, p. 53–54 and Eklund 2008, p. 566. *Barnard* is not sure as to what is the real aim of the Directive: the facilitation of the freedom to provide services or the worker protection. See Barnard 2006, p. 288–289.
[448] Case C-341/05, *Laval* [2007] ECR I-11767, para. 80.
[449] *Wilhelmsson* has used the metaphor of 'jack-in-the-box', with which he means that Community law and its exigencies may surface in the most unexpected contexts. See Wilhelmsson 1997, p. 359.
[450] Due 1999, p. 73.

misinterpreting the purpose of the PWD, its view is probably shared by quite a few Member States. The critics just might have been louder than those who agree[451]. All in all, when reading the Directive closely, it is easy to understand why the Court reached the conclusion it did. One may ask whether the PWD would really have any purpose at all if it did not restrict the application of national labour law to posted workers. Notwithstanding the fact that some Member States and various other internal market participants are unhappy with the Court's interpretation, it might not have been that unforeseeable after all.

Another position might have to be adopted with regard to the Court's rulings concerning posted third-country workers. On most occasions where the Court has been criticised of excessive judicial activism its decisions have been based solely on the EC Treaty. By establishing some fundamental principles like direct effect in *Costa v ENEL*[452] or mutual recognition in *Cassis de Dijon*[453] the Court has been genuinely innovative. Similarly, the unexpected decisions on posted third-country workers were based solely on the Treaty, Article 49 EC, without any secondary legislation to lean on. Considering the constant development in the field of services, the service provider's right to move freely with its workforce was something to be expected. The more surprising feature of these decisions was that such a right was granted also with respect to those workers who had no legal right under Community law to work in another Member State. It is possible to argue that since *Vander Elst*[454] the Court has been truly innovative when prohibiting Member States from using their powers in a field that until the Amsterdam Treaty was outside the Community competence. Even after the necessary legal bases for the harmonisation of labour migration within the EU were created, Member States have not proceeded with that competence. Moreover, the Member States still retain the authority to decide the number of TCNs they are willing to admit and the conditions under which TCNs may access the national employment market. In the field of provision of services that discretion has now been abolished. Considering that at the time of *Rush Portuguesa* and *Vander Elst* the Court did not have any jurisdiction on the matters regarding immigration, those judgments were undoubtedly somewhat unpredictable.

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[451] *Malmberg* and *Sigeman* write that the judgment in *Laval* must appear surprising to those who adopted the PWD in 1996. According to them, the Court is showing a lack of loyalty with regard to democratic processes in the EU. See Malmberg and Sigeman 2008, p. 1145.
[452] Case 6/64, *Costa v ENEL* [1964] ECR English Special Edition 585.
[453] Case 120/78, *Cassis de Dijon* [1979] ECR 649.
[454] Case C-43/93, *Vander Elst* [1994] ECR I-3803.

7.3 *Laval* and *Rüffert*: Implications for the Future

A lot of proposals have been put forward concerning the way the PWD should be interpreted. There is no more uncertainty when it comes to the position the Court has taken. In *Rüffert*[455] the Court confirmed that the interpretation of the PWD is confirmed by reading it in light of Article 49 EC, since 'that directive seeks in particular to bring about the freedom to provide services'. In the aftermath of *Laval* and *Rüffert*, it seems that some legislative changes need to be made, either on the Community or the national level. One option that has already been put forward is to change the Posted Workers' Directive[456]. As ironic as it might seem, without the PWD the Court might have ended up with a somewhat different solution in *Laval*. In the pre-PWD case law the Court had granted a wide possibility to apply the national legislation and collective agreements to visiting service providers. It was actually the Directive itself that restricted the Member State's margin of choice by laying down an exhaustive list of rules to obey[457]. Some argue that it would be wise to broaden the legal basis of the PWD to guide the Court in the right direction[458]. However, if the legal basis of the PWD were to be changed, it would probably be even harder to reach consensus for example under Article 137 EC. It is also difficult to point out on which one of the Article's provisions the directive could exactly be based[459]. Article 94 EC on the approximation of laws, on the other hand, requires unanimity in the Council.

Earlier contradictory cases have shown that Member States most likely will accept the situation and act accordingly. The more difficult the legislative process, the more difficult it is to correct court interpretation of old acts by the enactment of new ones[460]. Therefore, a more likely scenario is that there will be some changes on the level of national regulation.

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[455] Case C-346/06, *Rüffert* [2008], the judgment of 3 April 2008, not yet published in the ECR, para. 36.
[456] Ahlberg, Bruun and Malmberg 2006, p. 163. The authors note that the system of 'checks and balances' in Community law presupposes that the legislator can change the law if the Court's interpretations are regarded as leading to unacceptable results.
[457] It is, however, difficult to speculate what the result would have been without the PWD in *Laval* considering that already in *Arblade and Others* the Court had noted that collective agreements must be sufficiently precise so that they do not render it excessively difficult for a service provider to determine his obligations in the host state. See joined cases C-369/96 and C-376/96, *Arblade and Others* [1999] ECR I-8453, para. 43.
[458] Houwerzijl 2006, p. 196.
[459] See Giesen 2003, p. 144–145. *Giesen* argues that the overall problem is that in Community law there are no comprehensive legal bases for the harmonisation of social law. *Hellsten* writes that with regard to labour law, the EC Treaty is a result of fragmentary development with some embarrassingly contradictory results. See Hellsten 2007, the fourth article, p. 16–17.
[460] Shapiro 1999, p. 328.

The most obvious solution would be to have a system of universal application of collective agreements in all Member States. That will, however, be difficult to achieve considering that for example the Swedish system of collective bargaining is very much based on the idea that the Government authorities do not in any way regulate the system of industrial relations. Moreover, it seems that only those provisions of the collective agreements that contain rules on the mandatory rules laid down in Article 3(1) of the PWD could be declared universally applicable with regard to posting undertakings. In Sweden, the system of universal application would, however, solve the problem with the so-called 'Lex Britannia' since universally applicable collective agreements would apply to all undertakings in the same manner leaving no room for discrimination. In any case, it seems that some changes are inevitable. Sweden has partly delegated the implementation of the PWD to local trade unions[461]. Now that the ECJ has ruled that a collective action taken against a posting service provider may be contrary to Community law, Sweden has been left without an effective means to enforce local minimum wages. To prevent further social dumping in posting situations, which is also one of the purposes of the PWD, Sweden should examine whether it would be possible to change the national legislation or at least the negotiation system used for reaching an accord on applicable wages.

In Germany, the *Rüffert* case does not pose such manifest challenges to the national system of collective bargaining as *Laval* does in Sweden. Luckily for Germany, the country has a system for declaring collective agreements to be universally applicable. The implication of *Rüffert* is that when it comes to the application of collective agreements to foreign service providers posting workers to Germany, it is only the universally applicable collective agreements that may be relied on. Taking into account this limitation, the inclusion of labour clauses in public contracts is actually an excellent means for creating legal certainty as to what are the national rules to be complied with. However, it goes without saying that labour clauses, as public works contracts in general, must be in accordance with the PWD. Having said that, it would be wishful thinking to propose that most Member States' legislation, collective agreements and practices are in full conformity with the PWD. The Swedish and German cases are likely to be only the beginning of what may prove to be one of the Court's most controversial and contested lines of case law yet.

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[461] Sigeman and Inston, p. 369.

8 Discussion

The ECJ's decisions concerning posted workers have had a significant impact both on the national employment and immigration law of the EU Member States. Although the Court's rulings in the latter field have been more innovative considering the lack of support in the secondary legislation, the judicial guidelines given in the first have proved much more controversial. The groundbreaking judgments concerning posted third-country workers have been accepted without much protest among the Member States and legal scholars. Little public attention has been paid to the fact that since those judgments there has been a large group of third-country nationals who are able to work around the Union with one single work permit relatively free from administrative and bureaucratic hassle. This suggests that a common policy on labour migration in the EU might not be such a distant dream as it seems at the moment. More than a decade has passed since the rulings in *Rush Portuguesa* and *Vander Elst*. Member States have not reported any significant trouble relating to the misuse of the freedom to provide services as a way of circumventing national immigration rules. In order to provide for more legal clarity, Member States should now take further legislative steps with regard to the legal status of third-country nationals in the EU. Considering the positive experiences gained in the field of services, the time might be ripe for introducing an EU work permit for all third-country nationals legally resident in the Union. The internal market is not able to function optimally as long as legally residing TCNs are not given similar rights of free movement as EU citizens. Within a globalising world economy, and especially within an internal market, individuals should be equally mobile as goods and services. However, labour is not a commodity and third-country nationals should not be more of a commodity than EU citizens. Therefore, the EU must make sure that its immigrants are given an adequate level of protection for their rights. Hopefully the derived right of free movement the non-EU citizens are now enjoying through their employer within the free movement of services will soon be granted to them directly.

No such straightforward recommendation may be proposed in the field of employment law. To what extent exactly should the national labour laws and collective agreements be applied to posted workers? That is a very sensitive political question on which an agreement is extremely difficult to reach. Although the issue is closely connected to the

smooth functioning of the internal market in services, it is also inevitably linked with such social questions concerning which the Member States still want the right to have the final say. However, a consensus amongst the Member States is desirable since the more similar their views are, the better the implications on the free movement of services. Also for this reason legislative steps should be taken only when it is clear what one is legislating for. Incoherent and complicated directives are not capable of creating the necessary legal certainty in the cross-border provision of services. Now we are facing a situation where trade unions claim that the Posted Workers' Directive is an instrument for social protection, whereas posting undertakings consider it as an exhaustive affirmation of those rules that may be applied to them. If there is a growing concern with the result of *Laval* and *Rüffert*, it is definitely Brussels rather than Luxembourg that should take the biggest hits. However, finding the right institution to blame does not make the situation any better. A directive on posting of workers is necessarily a compromise and it will hardly be supported by everybody in full. Now it remains to be seen whether those unhappy with the Court's interpretation of the Posted Workers' Directive can accept it and base their future behaviour on that interpretation. If they can, the European Court of Justice has once again proved it is able to give the necessary push towards further struggle in the attainment of a genuinely integrated European Union, even in the field of services.